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Part A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FILED
JUL 5 1981
S. ALAN COOK
CLERK SUPREME COURT
BY

STATE OF ARIZONA,

Appellee,

v.

RICKY WAYNE TISON,

Appellant.

No. 4612

Appeal from the Superior Court of Yuma County
Cause No. 9299
Honorable Douglas W. Keddie, Judge

AFFIRMED

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STRUCKMEYER, Chief Justice

This appeal is by Ricky Wayne Tison from judgments of guilty and death sentences on four counts of first degree murder. He also appeals from judgments of guilty and sentences on three counts of kidnapping, two counts of armed robbery, and one count of theft of a motor vehicle. Jurisdiction of this Court is pursuant to A.R.S. § 13-4031.

On July 30, 1978, appellant and his two brothers, Raymond and Donald Tison, assisted in the escape of their father, Gary Tison, and Randy Greenawalt from the Arizona State Prison. Both appellant's father and Greenawalt were serving life sentences for murder at the time. Appellant's convictions for crimes arising out of the prison escape and subsequent capture twelve days later were recently affirmed by this Court. State v. Greenawalt, et al., ____ Ariz. ____, 626 P.2d 118 (1981).

The five men fled the prison in a green Ford. Later they transferred to a Lincoln Continental. The Lincoln was discovered on August 6, 1978 in Yuma County, Arizona near Quartzsite. In and around the vehicle were the bodies of John and Donnelda Lyons and their twenty-two-month-old son, Christopher. The body of a niece of the Lyonses, Theresa Tyson, was later found approximately one-fifth of a mile west of the Lincoln. All four had died from shotgun wounds.

The Lyonses had left Yuma on the night of July 31, 1978 on a vacation in a late model Mazda. A vehicle matching this description was subsequently discovered in Coconino County, Arizona near Flagstaff.

On August 11, 1978, the appellant, together with the other Tisons and Greenawalt, ran through two roadblocks south of Casa Grande, Arizona in a Ford van. After exchanging gunfire with police officers at the roadblocks, the van turned off into the

desert and stopped. Donald Tison was found in the driver's seat of the van. He had been shot in the head. Appellant, his brother Raymond, and Greenawalt were captured nearby in the desert. Gary Tison was found dead several days later further on into the desert.

This Court recently affirmed Greenawalt's convictions and sentences arising from the four murders near Quartzsite. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Today we affirm Ricky and Raymond Tison's convictions and sentences for these crimes in this opinion and in the companion opinion of State v. Raymond Curtis Tison, ____ Ariz. ____, ____ P.2d ____ (1981) (No. 4624, filed this date).

After his capture, appellant made statements describing the prison breakout and subsequent activities, including the four murders. From these statements and other evidence introduced at trial, it was established that the breakout had been planned for some time. Appellant took an active part in the preparation, including obtaining guns and the Lincoln Continental. A gunsmith testified that appellant approached him about sawing off shotguns. The gunsmith also stated appellant, through his mother, purchased a .45 caliber Colt handgun from him. Two cartridges identified as having been fired from this gun were found near the murder scene.

Appellant in his statements explained that the Lincoln became disabled with a flat tire near Yuma. The Mazda was flagged down and all five men pulled guns on the Mazda's occupants, who were taken out of that car and placed in the Continental. Both cars were then taken down another road and parked trunk to trunk. Articles were exchanged between cars, and money and weapons belonging to John Lyons were taken. The Continental was then moved a short distance further, where Gary Tison and Greenawalt shot the victims.

The five men drove off in the Mazda. Within hours, appellant purchased paint to use on the Mazda. A few days later, the repainted Mazda was abandoned in the woods near Flagstaff.

The appellant first contends that a plea agreement which he had entered into should be specifically enforced against the State because, he asserts, he was willing to abide by the terms of the agreement. The agreement provided that appellant would plead guilty to one count of murder in the first degree for a recommended sentence of 25 years to life. In exchange, appellant would:

> "* * * appear and testify truthfully in any proceedings pertaining to criminal charges relating to an incident occurring on or about August 1, 1978 in which the John Lyons family and Theresa Tyson were killed."

Appellant thereafter gave statements describing his participation in the murders, but a dispute arose as to the scope of the testimony which he would give in subsequent proceedings. Consequently, appellant withdrew his plea of guilty. Raymond Tison, in response to questions from the trial judge, explained:

> "MR. RAYMOND TISON: Okay, the plea agreement says the incident. I figured they were talking about this incident going on up at Quartzsite. I had no idea that you were going to be asking about other people involved, about the escape, all this, and maybe what happened afterwards. I thought it was just going to be that incident. I would be happy to get up there and testify just to that incident, but that's it. I'm not involving nobody else. I'm staying right there. I will start from one time before we came there and before we left or to wherever we left.
>
> THE COURT: Is that your position also, Ricky?
>
> MR. RICKY TISON: Yes."

The appellant's position that the plea agreement should be specifically enforced against the State arises from his understanding of Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). There, the prosecution promised not to make a recommendation for sentencing in exchange for the accused's plea of guilty. At the sentencing hearing, the prosecutor appeared

and recommended that the maximum sentence be imposed, contrary to an earlier prosecutor's avowal that no recommendation as to the sentence would be made. The sentencing judge imposed the maximum sentence. The United States Supreme Court, in disapproving the practice, stated:

> "* * * when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262, 92 S.Ct. at 499.

Accord, State v. Stone, 111 Ariz. 62, 523 P.2d 493 (1974). The Court vacated the judgment and remanded to the state court to either allow the defendant the opportunity to withdraw the plea or specifically enforce the agreement against the prosecution.

While the remedy of specific performance of the plea bargain was sanctioned in Santobello for the unkept bargains of a prosecutor, it has rarely been used. See Note, The Legitimation of Plea Bargaining; Remedies for Broken Promises, 11 Am.Crim.L.Rev. 771 (1973). And see United States v. Nathan, 476 F.2d 456, 459 (2nd Cir. 1973), where specific enforcement of a plea agreement was refused because the defendant failed to disclose the agreed information.

The appellant argues in spite of his failure to carry out the terms of the plea bargain that he should be entitled to specific performance. He asserts that he was compelled to withdraw from his plea of guilty because the agreement's scope had been too broadly construed by the prosecution. We disagree. By the terms of the plea agreement, appellant was to provide testimony "in any proceedings", which he has refused to do. His non-compliance with the plea agreement precludes him from the relief requested.

It is argued that the language of the plea bargain did not contemplate appellant's testimony as to the conspiracy and the

prison breakout, but neither did it explicitly limit his testimony to the events at the scene of the Yuma County murders. A guilty plea will not be set aside because of a "defendant's mistaken subjective impressions * * * absent substantial objective evidence showing such impressions to be reasonably justified * * * ", State v. Pritchett, 27 Ariz.App. 701, 703, 558 P.2d 729 (1976); see State v. Zarate, 106 Ariz. 450, 478 P.2d 74 (1970). Neither will a plea agreement be specifically enforced according to a defendant's unilateral interpretation of the terms of the bargain in the absence of objective evidence indicating that the interpretation is reasonably justified. See Adamson v. Superior Court of Arizona, 125 Ariz. 579, 611 P.2d 932 (1980). In State v. Cornwall, 114 Ariz. 550, 552, 562 P.2d 723 (1977), we held:

> "* * * it is the duty of all parties involved to insure that the agreement which is eventually filed with the court contains the exact and complete agreement, no more, no less. And because the requirement to have the exact agreement in writing before the court applies with equal force to the defense, we are of the opinion that, had the defendant wished to plead under a different agreement or had he wished the inclusion of terms and conditions not already contained therein, it was incumbent upon him to object and to require the exact agreement to be evidenced in writing * * *."

It is also appellant's contention that the State did not prove he breached the terms of the plea agreement and that an evidentiary hearing on this question should have been conducted by the court below. We think, however, that the State has satisfied its burden of proof because the unequivocal refusal to testify by the appellant establishes a breach of the plea bargain. Moreover, the claim of error because of the failure to hold an evidentiary hearing on this question is waived since it was not requested in the court below. See State v. Coward, 108 Ariz. 270, 496 P.2d 131 (1972).

Appellant urges that the trial court erred in not appointing an expert to conduct a public opinion survey to support appellant's motion to change venue. Our statute provides for the appointment of experts in capital cases when such experts are reasonably necessary to adequately present a defense. A.R.S. § 13-1673(B) (now A.R.S. § 13-4013(B)). Constitutional considerations may also mandate the appointment of investigators to aid in preparing a defense. See Mason v. State of Arizona, 504 F.2d 1345 (9th Cir. 1974); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977). But there was no error here in the denial of an expert to conduct a public opinion survey since the expert's findings would have no "bearing on the ultimate question of * * * guilt or innocence" and therefore the expert was not necessary to the preparation of a defense. State v. Smith, 123 Ariz. 231, 237, 599 P.2d 187 (1979); see State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 833 (1981); State v. Powers, 96 Idaho 833, 537 P.2d 1369 (1975).

Appellant urges that the trial court erred in its failure to excuse for cause a juror who expressed an opinion as to the guilt of appellant. On voir dire, the juror first noted that she had been especially moved by the killing of the child and she then expressed a belief that appellant was guilty. But she responded affirmatively when asked if she could judge the case on the evidence presented. When she was challenged for cause, this exchange occurred between the prosecution and the trial judge:

> "MR. IRWIN: Your Honor, we think that Mrs. Jackson should be permitted to stay on the jury. That is a fact, of course, that she evinces some emotion. A person wouldn't be a normal person if they didn't. She indicated that she would be able to set aside evidence she had seen in the newspapers, read about, heard about, and try the case fairly on the evidence presented in the courtroom.

THE COURT: Yes, I understood Mrs. Jackson to state that she could judge the case on the evidence produced in the court. The challenge is overruled."

The appellant attacks our decision in State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965), as denying him due process because it permits jurors with a preconceived notion of the guilt or innocence of the accused to sit on the jury. In Narten we held that jurors possessing an unqualified opinion should be disqualified because it would necessarily carry over and affect their ultimate decision in the case. The fact, however, that a prospective juror possesses an opinion or belief regarding the guilt of the defendant does not mean that the juror would be influenced by that belief and could not render a fair and impartial verdict. See Burnett v. State, 34 Ariz. 129, 268 P. 611 (1928). See also State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118, 123-124 (1981). The responsibility for determining whether a juror can render a fair and impartial verdict lies with the trial court, and we will not disturb that exercise of discretion absent a clear showing of an abuse of discretion. State v. Rose, 121 Ariz. 131, 589 P.2d 5 (1978). The trial judge was satisfied that the juror could deliberate and render a fair and impartial verdict. Without a showing of unqualified partiality of the juror, we will not upset a determination so clearly within the province of the court.

Appellant argues that the trial court improperly denied various pretrial motions urged by appellant. The determinations of these motions also rests within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion and resulting prejudice to the defendant. State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981); State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981).

Appellant's position is, first, that the trial court erred in refusing to grant a motion for change of venue because of the pretrial publicity.

Rule 10.3(b), Rules of Criminal Procedure, 17 A.R.S. provides:

> "Whenever the grounds for change of place of trial are based on pretrial publicity, the moving party shall be required to prove that the dissemination of the prejudicial material will probably result in the party being deprived of a fair trial."

The trial judge learned through voir dire that all of the potential jurors who were needed to obtain a panel of 34 had some familiarity with the events in question. Mere knowledge of the facts of a case standing alone does not mandate a change of venue. See State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). It must be shown that prejudicial publicity had the probable effect of precluding a trial by fair and impartial jurors before a change of venue is required. Id. Appellant failed to make such a showing. The jury selection process took only a relatively short amount of time. Forty persons were called and only four of those had formed an unqualified opinion as to defendant's guilt. The probability that the members of the jury were prejudicially affected by pretrial publicity is not supported by a review of the record.

In a similar vein, appellant asserts that the trial court erred in its denial of his motions for change of venire and a continuance because of the pretrial publicity. We find no evidence to support his position and the trial court's determination in this regard will not be upset.

Appellant asserts error because the trial court failed to have the jury sequestered. However, the record does not show either juror misconduct or a failure of the jury to follow the admonitions given by the trial judge. Id. at 840.

Appellant asserts that the trial court improperly refused to permit voir dire of each individual juror. The responsibility

for conducting voir dire examination lies with the trial judge. The court in its discretion may permit counsel to examine an individual juror when good cause appears. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 839-840 (1981); State v. Smith, 114 Ariz. 415, 561 P.2d 739 (1977); Rule 18.5(d), Rules of Criminal Procedure, 17 A.R.S.

In the case at bar, the trial judge advised counsel for the appellant that he would be allowed to specifically question prospective jurors once the voir dire examination was completed by the trial judge. The trial judge extensively questioned the prospective jurors in the areas of pretrial publicity, awareness of the appellant's background, any alleged statements attributed to the appellant, and the existence of any prior opinions as to guilt. The trial judge then permitted appellant's counsel to ask questions, and eight of the prospective jurors were questioned by him. We do not understand how the appellant was prejudiced by this procedure. The method adopted by the trial court adequately accomplished the purpose of voir dire to determine whether prospective jurors can fairly and impartially decide the case. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 840 (1981).

Appellant urges that he was deprived of a fair trial guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution because of the pretrial publicity in this matter. He urges first that the newspapers engaged in a practice of "unchecked and irresponsible journalism" creating a carnival-like atmosphere, precluding the possibility of a fair trial as was condemned in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

In State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979), we recognized that the mere dissemination of biased news accounts

may so influence the community as to pervade the proceedings and that prejudice would be presumed. However, there still must be shown circumstances so outrageous that it can be concluded the trial was conducted in less than a solemn and sober manner. State v. Greenawalt, et al, 626 P.2d 118 (1981); see Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). The record fails to disclose the existence of such outrageous circumstances. It does not appear that the trial was conducted in a manner other than solemn and sober. In the absence of circumstances from which prejudice can be presumed, appellant must show that specific publicity of a prejudicial nature reached the prospective jurors. State v. Greenawalt, et al, ____ Ariz. ____ 626 P.2d 118 (1981); State v. Smith, 116 Ariz. 387, 569 P.2d 817 (1977).

An examination of the record leads to the conclusion that during the occurrence of the events in question, especially after the escape from the state prison and after the appellant's implication in the murder of the Lyons family, press coverage was very extensive. While the hunt for the Tisons was in progress, appellant and his accomplices were the subject of numerous front page articles. However, the degree of press interest lessened after the discovery of the body of Gary Tison, the group's reputed leader. The record does not show that prior to the trials of Randy Greenawalt and appellant and his brother, Raymond, the press coverage rose to the level it occupied at the time the offenses occurred. But were it otherwise, the magnitude of the publicity will not alone result in a reversal. There must be a showing by the accused of some prejudicial effect of the publicity. State v. Greenawalt, ____ Ariz. ____, et al, 626 P.2d 118, (1981).

The presence of publicity-caused jury prejudice can usually be found by an examination of two common factors: the nature of the publicity and the difficulty in selecting a jury. Neither factor is present to the extent that would tend to indicate the presence of prejudice. The pretrial publicity not only tapered off near the appellant's trial date, but, in addition, only a few of the many newspaper articles that were written could be said to be inflammatory. Of those, the articles appearing on the editorial page of the Arizona Republic, a Phoenix newspaper, were the most incendiary. Only one juror who participated in the deliberations read the Arizona Republic, and that person stated that he had not formed any preconceived opinions as to the appellant's guilt.

The relative ease with which the jury selection process took place is also indicative of a lack of prejudice. Only 40 prospective jurors were needed to fill the requisite panel of 34. Of these, only four were excused by the court for their fixed opinion of the appellant's guilt. Of the 34 on the panel, none had formed any preliminary opinions about the case, nor had any of them heard of any alleged statements made by appellant, his brother, or Randy Greenawalt, nor did those on the panel possess any knowledge of the prior history and background of appellant. Unless there are objective indications of jurors' prejudice, we will not presume its existence.

In his sixth assignment of error, appellant claims that the trial court erred in failing to suppress three incriminating statements which were made by appellant subsequent to his capture and while incarcerated at the Pinal County Jail in Florence, Arizona. He urges several grounds for the exclusion of these statements, including assertions that they were obtained in

violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and the Sixth Amendment right to counsel. We will not, however, concern ourselves with these matters because of the failure to raise these issues at the suppression hearing held in the court below. Issues concerning the suppression of evidence which were not raised in the trial court are waived on appeal. State v. Griffin, 117 Ariz. 54, 570 P.2d 1067 (1977); see Rule 16.1(c), Rules of Criminal Procedure, 17 A.R.S. The preclusion of issues applies to constitutional objections as well as statutory objections because an adherence to procedural rules serves a legitimate state interest in the timely and efficient presentation of issues. State v. Griffin, supra; State v. Neese, 126 Ariz. 499, 616 P.2d 959 (App. 1980); see Michigan v. Tyler, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7, 56 L.Ed.2d 486 (1978). When a defendant chooses legal representation, the power of decision is delegated to the lawyer, see Standard 4-5.2, Standards for Criminal Justice, and his decisions may be binding upon the defendant, even though rights of constitutional dimensions have been lost. See Wainwright v. Sykes, 433 U.S. 72, 91, 97 S.Ct. 2497, 2509, 53 L.Ed.2d 594 (1977)(Burger, C.J., concurring); Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). Thus, the challenge to the admissibility of the statements on the grounds of involuntariness preserved for review only that issue.

An examination of the voluntariness of the statements given by appellant requires a further elaboration of the facts.

On August 11, 1978, in the early morning hours, a Ford van approached a roadblock set up near Casa Grande, manned by a number of law enforcement officers. When the officers attempted to check the vehicle, gun shots were fired from it. Thereafter,

a high speed chase ensued for eight to ten miles, with gunfire coming from the rear of the van. At a second roadblock, the van was stopped after running off the highway. The officers saw several of the occupants fleeing into the desert, and upon searching the van found Donald Tison, who was unconscious with a gunshot wound in his head. Later, with the assistance of helicopters equipped with search lights and aerial flares, the officers located and arrested appellant, his brother Raymond Tison and Randy Greenawalt hiding a short distance from the van. After being stripped, searched, handcuffed and shackled, they were placed in the bed of a pickup truck while the officers continued their search for Gary Tison.

At 5:30 a.m., appellant was placed in a police vehicle along with three officers (Harville, Solis and Martinez). At that time, appellant was nude except for a blanket which had been put over him. Appellant had blood spattered on his chest, apparently from the gunshot wound sustained by Donald Tison. Appellant was advised of his Miranda rights and asked about his physical condition. He responded that he was all right and did not need a doctor. During this time he was neither threatened nor intimidated in any manner. There was some evidence that a statement was made to the appellant that he would be taken back and shown his brother, Donald. Appellant was questioned for a period of approximately ten to fifteen minutes. The interview terminated when appellant failed to disclose the information which the officers were attempting to obtain.

The second interview was conducted by Department of Public Safety Officers Salyer and Sanchez at approximately 7:00 a.m. The appellant was still nude, but in possession of the blanket. He was placed in the back seat of a vehicle in which the two officers sat in the front seat. Appellant was advised of his Miranda rights and "he just shrugged his shoulders" and began to talk. Officer

Salyer's testimony at the trial indicates what transpired:

> "A. Well, first I asked Ricky if he was okay, if he was hurt, if he needed any medical attention. He stated no. I offered him some coffee, something to eat. Again he refused.
>
> Q.[sic]: My one concern was to ascertain if Gary Tison was in fact with the group and the location of the girl that hadn't been found.
>
> As I talked to Ricky about the -- he first stated all they did was break the old man out. As I got to the point about the white Lincoln he became very excited. Said he didn't want to talk anymore. Didn't know anything about the Lincoln.
>
> At this time I started to get out of the car when someone came by and mentioned something about footprints.
>
> Q. Did you return to the car at that time?
>
> A. I hadn't left the car.
>
> Q. What did you say at that time?
>
> A. I told Ricky that there had been footprints found around the scene of the Lincoln and I asked him about what type shoes he was wearing. Again he became excited, said, 'All I know is that me and my brothers didn't shoot those people.'
>
> Q. What was your next statement?
>
> A. I said, 'Okay, I didn't say that you shot those people. I'm just trying to find out what happened.'
>
> I said, 'Let's just start at the beginning from when the thing first started and just go from there.'"

Appellant then related in some detail their activities, including a description of the murders of the Lyons family.

The third statement of appellant which was introduced at his trial occurred at the Pinal County Jail on the same day at approximately 12:40 p.m. Tom Brawley, of the Coconino County Sheriff's Office, questioned appellant. At this time he was neither wearing clothes nor did he have a blanket. He was advised of his Miranda rights and was not threatened in any manner. Brawley testified:

"A. I asked if he wanted to make a statement.

Q. What was his response?

A. He said that he didn't at that time.

Q. What happened next?

A. I then told him that we had a missing person in the case that we would like to find.

Q. What was his response to that?

A. He replied, 'Well, that's a bunch of shit about the girl.' He said, 'We didn't --' or he said, 'I'm not a sex fiend,' He said, 'We didn't take her with us. We left her there at the car.'"

Counsel for appellant at the hearing on a motion to suppress urged that the statements were inadmissible because of their involuntary nature.

In Arizona, confessions and admissions are prima facie involuntary and the burden is on the State to show by a preponderance of the evidence that they were freely and voluntarily made and not the product of physical or psychological coercion. The trial court's determination of the admissibility of a confession will not be disturbed in the absence of clear and manifest error. State v. Hall, 120 Ariz. 454, 586 P.2d 1266 (1978).

In determining the voluntariness of a confession, the trial judge must assess the totality of the circumstances surrounding the confession and decide whether the free will of the defendant has been overborne. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Hall, supra. "A confession will be found involuntary where the court, considering all the circumstances, determines that one of the following exists: (1) impermissible conduct by police, (2) coercive pressures not dispelled, or (3) confession derived directly from prior involuntary statement." State v. Gretzler, 126 Ariz. 60, 82, 612 P.2d 1023 (1980). None of the factors enumerated in Gretzler exist in the

present case. We find no clear and manifest error in the trial court's denial of the appellant's motion to suppress.

An examination of the circumstances surrounding the giving of appellant's statements supports the trial court's conclusion that they were voluntary. He chose to speak on three separate occasions after having been advised of his Miranda rights. The law enforcement officers who conducted the interrogations never threatened or coerced him, nor did they promise any benefits from his cooperation with them. The questioning lasted for only short periods of time. The officers provided appellant with a blanket and offered him medical attention and food. Considering all the circumstances, the facts do not indicate that the statements were involuntary, but, rather, that they were the product of the appellant's exercise of free will.

Appellant challenges an instruction given by the trial judge which purported to describe conspiracy and the liability of persons in a conspiracy. This is the same instruction quoted in State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 846-847 (1981). There we found no reversible error in the giving of the instruction even though, as here, the appellant had never been indicted or prosecuted for conspiracy. We recognized that the instruction stated the liability imposed by Arizona's criminal responsibility statute, A.R.S. § 13-139 (now A.R.S. § 13-301 et seq.):

> "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed."

Since appellant here was not convicted of conspiracy, his various arguments that the instruction did not reflect the law of the substantive crime of conspiracy or that there was insufficient evidence to warrant a conspiracy instruction are irrelevant.

Substantial evidence showed appellant's participation in the prison breakout, the robbery and kidnapping of the Lyonses and Theresa Tyson and the effort to avoid capture.

Arizona's statute A.R.S. § 13-542 provided:

> "A murder * * * which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in perpetration of or attempt to perpetrate * * * robbery * * * [or] kidnapping * * * is murder of the first degree."

The jury could have concluded from the evidence that the murders of the Lyons family and Theresa Tyson were committed either in avoiding lawful arrest, effecting an escape from legal custody, or in the perpetration of robbery or kidnapping. By force of A.R.S. § 13-139, appellant was therefore a principal in the homicides.

As we said in State v. Greenawalt, ____ Ariz. ____, 624 P.2d at 848:

> "While the requested instruction involving conspiracy added nothing to the State's theory of responsibility for the murders, under the felony murder statute, A.R.S. § 13-452, neither do we think it misled or confused the jury."

Appellant argues that due process requires that the conspiracy be charged in the indictment. It is true that there is a fundamental right to reasonable notice of the specific charge against an accused. Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948). Appellant was informed of the crimes of which he could be convicted. There is no requirement that appellant receive notice of how his responsibility for those offenses was to be proved. See Hunter v. State of Arizona, 47 Ariz. 244, 55 P.2d 310 (1936); State v. Mendibles, 25 Ariz.App. 392, 543 P.2d 1149 (1975); People v. Pike, 22 Cal.Rptr. 664, 372 P.2d 656, 666 (1962); People v. Remiro, 89 Cal.App.3d 809, 153 Cal.Rptr. 89 (1979).

Appellant next assigns as error the felony-murder instructions given by the court. First, appellant asserts that the trial judge failed to detail the "elements" of "avoiding or preventing lawful arrest or effecting an escape from legal custody" contained in former A.R.S. § 13-452.

Appellant never requested a more detailed explanation of the terms and never objected to the instruction given. Any error in instructions not objected to is waived unless the error is fundamental. State v. Dickey, 125 Ariz. 163, 169, 608 P.2d 302 (1970); see Rule 21.3(c), Rules of Criminal Procedure, 17 A.R.S.. Where the trial court fails to instruct on a matter vital to the rights of a defendant, such an omission constitutes fundamental error. State v. Miller, 120 Ariz. 224, 585 P.2d 244 (1978); State v. Hardy, 112 Ariz. 205, 540 P.2d 677 (1975); State v. Evans, 109 Ariz. 491, 512 P.2d 1225 (1973). In State v. Smith, 114 Ariz. 415, 420, 561 P.2d 739 (1977), we held fundamental error to be "error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial."

Appellant incorrectly terms the "avoiding or preventing lawful arrest" and "escape from legal custody" contained in the first degree murder statute, former A.R.S. § 13-452, as "underlying felonies." That statute provided in its entirety:

> "A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree."

In State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981), we recognized that the "arrest" and "escape" are not underlying felonies, but, rather, specified conduct. There we said:

> "* * * the State must present evidence sufficient to show that the murders were committed in 'avoiding or preventing lawful arrest or effecting an escape from legal custody,' or any of the other proscribed acts. Where the accused is charged with first degree murder, based upon the felony-murder statute, which itself requires a showing of another underlying crime or specified conduct as an element of the offense charged, evidence of the proscribed conduct cannot be precluded as being irrelevant or prejudicial." 624 P.2d at 844. (Emphasis in original.)

Put simply, no elements of the underlying crimes of "avoiding or preventing lawful arrest or effecting an escape from legal custody" were required since the terms as used in A.R.S. § 13-452 are not underlying felonies. Still the question remains whether the instruction sufficiently described the terms so as not to amount to fundamental error. People v. McGhee, 67 Mich.App. 12, 239 N.W.2d 741 (1976); see United States v. Brown, 616 F.2d 844 (5th Cir. 1980).

The underlying conduct which appellant claims was not sufficiently explained was never disputed. Appellant does not argue that the murders of the Lyons family and Theresa Tyson occurred in any manner other than in an effort to avoid arrest. Any prejudice to appellant from the court's failure to give a more particularized instruction is difficult to conceive. The conduct is, to a great extent, self-defining and a further explanation would have assisted the jury very little. It does not appear that the jury was misled. We find no fundamental error.

The appellant argues that the trial court erred in refusing to give an instruction on the termination of the underlying felonies or conduct regarding the application of the felony murder rule. He contends that the State has not shown any causal connection between the deaths and the crimes or conduct in this matter which underlie the application of the felony murder rule. We think the appellant's position ignores the undisputable facts in this case. By the

appellant's own statements, it is clear the murders occurred in the attempt to avoid lawful arrest and contemporaneously with the armed robbery and kidnapping of the Lyons family and Theresa Tyson. Thus, the murders took place during a series of events sufficiently causatively connected to the underlying crimes or conduct to support the instruction given. See State v. Gretzler, 126 Ariz. 60, 89-90, 612 P.2d 1023 (1980); State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976).

In his twelfth assignment of error, appellant urges that the trial court failed to instruct the jury on second degree murder. In State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 846 (1981), we held that the requested second degree murder instruction was properly refused because the evidence supported only the conclusion that the murders were committed during conduct specified in or in the perpetration of an offense enumerated in A.R.S. § 13-452. No evidence supported a second degree murder instruction. We likewise so hold here.

Appellant urges that the trial court erred in giving a flight instruction when the only evidence of flight was the appellant's capture a few hundred yards from the van in which he was riding when apprehended. It is the appellant's position that such evidence of flight manifested no consciousness of guilt on the part of appellant regarding the present charges, but bore relation only to the assaults occurring at the scene of the roadblock. We find no error in the trial court's giving of the flight instruction for the following reason. A flight instruction is permissible when evidence exists of open flight or of concealment. State v. Clark, 126 Ariz. 428, 434, 616 P.2d 888 (1980). "Evidence concerning flight is admitted because flight raises an inference which, when taken together with other evidence, points to a consciousness of

guilt on the part of a defendant." State v. Loyd, 126 Ariz. 364, 367, 616 P.2d 39, 42 (1980).

In the instant case, the record is replete with evidence of both open flight and concealment. After the homicides, appellant with his companions first stole the Lyonses' Mazda and painted it a different color. They then went to Flagstaff and changed to another vehicle, a pickup truck. Before leaving Flagstaff, they partially buried the Mazda and covered it with pine branches. Subsequently, they abandoned the pickup truck and obtained a van. When the appellant and the other members of the group were approached by law enforcement officers at the first roadblock near Casa Grande, they responded with gunfire and attempted to escape. A chase ensued with the occupants of the van shooting at the pursuing law enforcement vehicles. Appellant, his brother Raymond and Randy Greenawalt were taken into custody after being discovered hiding in the desert. It can reasonably be concluded that such conduct evidences a consciousness of guilt of prior criminal activities. Appellant's attempt to characterize their flight as only a flight from the events taking place at the roadblock does not explain their violent behavior upon confrontation by peace officers, which of itself was part of the flight.

Appellant asserts that the trial court committed error in denying appellant's request for transcripts of Randy Greenawalt's trial, which was conducted immediately prior to appellant's. Greenawalt, an accomplice of appellant, was charged with the same substantive charges made against appellant.

The United States Supreme Court in Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971), held that an indigent defendant must be provided with transcripts of a prior trial that ended in a mistrial without showing a specific need. The necessity of the transcripts to an effective defense was to

be presumed. But in an analogous situation, the Court through Justice Rehnquist said:

> "* * * the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Ross v. Moffitt, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974).

Hence, when the indigent defendant requests a transcript of a co-defendant's trial, its necessity to an effective defense is not presumed. Rather, a defendant must show specific need. State v. Razinha, 123 Ariz. 355, 599 P.2d 808 (App. 1979). In distinguishing Britt, the court in State v. Razinha said:

> "The reason for distinguishing between the Britt situation, a prior mistrial, and a situation analogous to the one here, a trial of a co-defendant, is that the witnesses may not be common. Even if they are, their testimony as to the co-defendant may differ greatly from their proposed testimony concerning the defendant's part in the crime, depending upon the circumstances of each case." 123 Ariz. at 358.

While the witnesses were the same in Greenawalt's and appellant's trials, there must still be a showing of specific need. No such need was established. Appellant did not and does not on appeal elaborate on how the transcripts would have assisted in either trial preparation or impeaching witnesses.

More important, as stated in State v. Little, 123 Ariz. 427, 429, 600 P.2d 40 (App. 1979):

> "Britt does not stand for the proposition that an indigent defendant is absolutely entitled to a transcript of the prior proceedings under all circumstances. It is only where the transcript is available to others for a price that the principles of Britt apply. Here, the transcript was not available to anyone. We do not believe that under the circumstances the trial court was required to delay the trial some unknown time in the future in order to secure the transcript."

Randy Greenawalt's trial was completed on February 16, 1979. Appellant's trial commenced February 20, 1979 and ended February 27. It appears the transcripts of Greenawalt's trial were not prepared and available until May 4, 1979. The transcripts not being available to others, they were not required to be provided to appellant.

Appellant contends that the sentences of life imprisonment without the possibility of parole he received on the kidnapping convictions were illegal in the absence of evidence that he personally injured the victims.

A.R.S. § 13-492(C) provides:

> "1. If the person subjected to the acts mentioned in subsection A or B suffers serious bodily harm inflicted by the person found guilty, the person found guilty shall be punished by life imprisonment without possibility of parole.
>
> 2. If the person subjected to any acts mentioned in subsection A or B does not suffer serious bodily harm the person found guilty shall be punished by imprisonment in the state prison from twenty to fifty years without possibility of parole until the minimum sentence has been served." (Emphasis added.)

If subsection (1) is read literally, § 13-492(C) provides no punishment where the victim is bodily harmed but the particular defendant is not shown to have personally inflicted the harm. The State's position is that the legislative intent in the enhancement of sentence was to deter kidnappers from injuring their victims by distinguishing between injury and non-injury cases, not between injuring and non-injuring kidnappers. We agree, and hold that the sentence enhancement in A.R.S. § 13-492(C)(1) comes into play whenever a kidnapping victim is bodily harmed, even though the particular defendant convicted of kidnapping did not personally inflict the harm.

Before addressing the appellant's challenge to the determination by the sentencing judge that the sentences of death were appropriate for this defendant on these facts, the appellant has raised various issues concerning the constitutionality of our death penalty statute.

Specifically, he asserts that: (1) the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (2) the decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), is unconstitutional because the mitigation provisions of the statute are not severable from the remainder of the statute; (3) the decision in State v. Watson, supra, is a prohibited exercise of legislative power and constitutes a judicial enactment of a bill of attainder prohibited by Article I, Section 10 of the United States Constitution; (4) the death penalty as re-created by State v. Watson, supra, will be imposed wantonly, arbitrarily and freakishly because it contains no ascertainable standards for the sentencing body to measure the relative weights of the aggravating and mitigating circumstances; and (5) the statute improperly allocates the burden of proof in requiring the defendant to prove the existence of mitigating factors and not requiring the prosecution to establish aggravating circumstances beyond a reasonable doubt. These issues have been resolved in State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981), and it is unnecessary to reconsider them at this time.

Appellant complains that the trial court erred in determining the existence of three aggravating circumstances from which it concluded to impose a death sentence. By A.R.S. § 13-454(D) and (E) (now A.R.S. § 13-703(E) and (F)), the court shall impose a sentence of death if it finds one or more of the aggravating circumstances enumerated in subsec. (E) and that there are no mitigating circumstances "sufficiently substantial to call for leniency." A.R.S. § 13-454(E) provides:

> "Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner."

The appellant complains that the sentencing court found the presence of an aggravating circumstance pursuant to A.R.S. § 13-454(E)(3). He argues that the court erred in finding this because its applicability is limited to those factual situations where a grave risk of death has been created which threatens persons other than the intended victims. In essence, the appellant is urging that the simultaneous multiple murders where all the victims met their deaths cannot be construed to result in a finding of aggravation consistent with this statutory provision. We, too, have trouble rationalizing the aggravating circumstance set forth in A.R.S. § 13-454(E)(3) (now A.R.S. § 13-703(F)(3)) with the facts of this case.

The finding by the sentencing court of the existence of this aggravating circumstance does have some support in the evidence. The body of John Lyons was found near the Lincoln automobile in which the bodies of Donnelda and Christopher Lyons were found. They were close enough together to suggest that the shooting of any one of the three created a grave risk of danger to the other

two, particularly in the case of Donnelda and Christopher Lyons. But, taking all the facts into consideration, there is a suggestion that all four were ruthlessly and intentionally murdered. We think the evidence could be viewed in the light of the latter hypothesis and therefore we cannot conclude that § 13-454(E)(3) has any application to this case.

The sentencing court found the existence of the aggravating circumstances in A.R.S. § 13-454(E)(5)(now A.R.S. § 13-703(F)(5)):

> "The defendant committed the offense as consideration for the receipt, or in expectation or the receipt, of anything of pecuniary value."

Appellant's position is that in conjunction with (E)(4), the legislative intent was to apply this section only to the "hired gun" or "contract killer." However, we have previously held to the contrary in State v. Clark, supra. There, we approved the finding of an aggravating circumstance upon evidence of a robbery-murder. We found that the multiple murders in that case were committed for financial gain because the defendant had stolen money, credit cards, two diamond rings and an automobile. Id. at 436; see also State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980). Here, the appellant's statements along with other evidence revealed that the Lyonses' vehicle was stopped after the Lincoln became disabled. The Lyonses' automobile and various items of personal property were stolen. According to appellant's statements appearing in a psychological evaluation offered in evidence at the mitigation hearing, "the whole purpose was to obtain an automobile."

The appellant also challenges the sentencing court's finding that the offenses were committed "in an especially heinous, cruel, or depraved manner." A.R.S. § 13-454(E)(6)(now A.R.S. § 13-703 (F)(6)). He asserts that the murders were carried out by the infliction of numerous shotgun blasts causing instantaneous death to all of the victims except Theresa Tyson, and that no additional

facts exist which set this first degree murder apart from the usual one. In the special verdict, the sentencing judge said:

> "This finding is based on the evidence that the victims' vehicle was stopped, they and the vehicle were moved from the highway into the desert, and some, if not all, of the victims were placed in the Lincoln automobile where at least Donnelda Lyons and Christopher Lyons were murdered. Clearly the fatal wounds of John Lyons and Theresa Tyson were inflicted in or near the Lincoln. The conclusion is inescapable that all the victims were moved from the highway under force and, considering the arsenal possessed by the defedants [sic] and the manner in which the victims were killed, very probably at gun point. Necessarily John Lyons, Donnelda Lyons and Theresa Tyson had time to become and must have become apprehensive about their welfare and that of Christopher at first and ultimately about all their lives before the fatal shots were fired. The stress and fear each must have initially experienced had to have grown to immense, almost unimaginable proportions before they were murdered. And it is not unreasonable to conclude that one or more of the victims witnessed the murder of the others before his or her turn came, and that very likely, from where they were found, Theresa Tyson and John Lyons were those witnesses. The emotions certainly experienced by John Lyons, Donnelda Lyons and Theresa Tyson in those last minutes of their lives were the equivalent of the severest physical torture.
>
> This finding is also based on the senselessness of the murders. It was not essential to the defendants' continuing evasion of arrest that these persons be murdered. The victims could have easily been restrained sufficiently to permit the defendants to travel a long distance before the robberies, the kidnappings and the theft were reported. And in any event the killing of Christopher Lyons, who could pose no conceivable threat to the defendants, by itself compels the conclusion that it was committed in a depraved manner."

In State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491 (1980), we explained the meaning of the terms embraced by (E)(6):

> "The aspect of cruelty involves the pain and the mental and physical distress visited upon the victims. Heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions."

Accord State v. Bishop, ___ Ariz. ___, 622 P.2d 478 (1980); State v. Clark, supra. For a finding of cruelty, we have required that evidence of the suffering or pain experienced by the victims be apparent. State v. Clark, supra; State v. Ceja, supra. In the

instant case, no evidence was offered to establish pain or suffering by the victims other than the medical testimony indicating that Theresa Tyson did not die instantly, but bled to death. However, the sentencing judge surmised that the victims must have experienced a great degree of mental pain by being moved from the highway at gunpoint in apprehension of the possibility of eventually being murdered and through witnessing the commission of the murders on the other family members. Such a conclusion is reasonable on these facts, but we do not rest our approval of the findings of (E)(6) alone on the existence of cruelty.

The evidence supports a finding that the murders were committed in a heinous and depraved manner. The senselessness of the murders, given the inability of the victims to thwart the escape, especially in such an isolated area, and the fact that a young child, less than two years old, who posed no threat to the captors, was indiscriminately shot while in the arms of his mother, compels the conclusion that the actual slayers possessed a shockingly evil state of mind. Less violent alternatives which would have served their purposes in preventing their detection by the authorities were obviously available. But they chose to slaughter an entire family and Theresa Tyson. The crimes were well within the plain meaning of the legislative language "especially heinous * * * or depraved * * *."

Appellant also argues that this aggravating circumstance, "especially heinous, cruel or depraved," was improperly found by the sentencing court because A.R.S. § 13-454(E)(6) contemplates active personal involvement in the homicides and the only evidence before the court indicated that the appellant did not personally participate although he was present at the scene of the shooting. We reject this notion and construe the statute to mean that a defendant who is actually present at the homicide, having actively

participated in all the events leading thereto, will not be heard to deny that he was not causally connected with the crime at the highest level and in the fullest sense. But for the appellant's assistance from the moment he and his brothers furnished guns to Gary Tison and Greenawalt, the victims would not have died.

Further, we believe that the lower court mistakenly concluded that A.R.S. § 13-454(E)(1) and (2) should not apply.

Appellant was convicted of seventeen counts of assault with a deadly weapon for his participation in the events taking place at the prison and at his capture in Pinal County. As a result of these convictions, appellant received concurrent sentences on each count of 30 years to life. See State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981). The trial court's belief that the charges could have been brought in a single information or indictment along with the charges in this case unduly limits the statutory reach of the legislative act. The criminal offenses which occurred in Pinal County constitute separate offenses. They arose out of different incidents which had taken place at the prison and at the roadblock. These convictions were punishable by life imprisonment and, therefore, should have been considered aggravating circumstances under (E)(1).

The convictions were also an aggravating circumstance under (E)(2): appellant "was previously convicted of a felony in the United States involving the use or threat of violence on another person." The felony convictions of assault with a deadly weapon necessarily involved the type of violent behavior against which this aggravating circumstance is directed. That some of the offenses occurred subsequent in time to the offenses which are now upon review does not alter our conclusion. The consideration of these convictions as aggravating circumstances regardless of

the time of their occurrence serves the legitimate purpose of the statute to evaluate the character and propensities of the appellant. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980); State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979). See also State v. Superior Ct. of State of Ariz., Etc., ___ Ariz. ___, 627 P.2d 1081 (1981).

We do not, however, base our decision on subsections (E)(1) and (2), being satisfied that subsections (E)(5) and (6) fully support the death sentences.

Appellant argues that in addition to the mitigating circumstances found by the trial judge (age, minimal prior criminal activity and convictions based on the felony murder rule), other mitigating circumstances exist. Appellant claims the psychological reports on his mother and himself establish the strong, manipulative influence his father, Gary Tison, had on him. We, however, conclude the report does not support this argument. While Dr. MacDonald, the psychologist, believed Gary Tison applied subtle and continual influence on appellant, he concluded appellant suffered from no thought disorders and:

> "became involved in these events on his own volition, planning it carefully, not under the influence of drugs or alcohol, not under any threat or undue persuasion and certainly not while in a state of psychosis or high mental disturbance." (Emphasis added.)

The facts also do not support appellant's contention. There was substantial evidence that appellant along with his brothers planned the escape from the beginning and that he continued with his father and Greenawalt both before and after the murder , even though there were obvious opportunities to dissociate himself from them.

Appellant also argues as mitigating circumstances that numerous persons wrote letters on his behalf, pointing out his prior non-violent character, and the fact that he did not actually commit the murders. However, we are not impressed. The evidence from beginning to end establishes the ruthless character of the participants in the offenses. Appellant planned the escape for months with his brothers. During that time they gathered together an arsenal of lethal weapons which were used against others during the prison breakout. Later the same weapons were used by appellant and his companions to kidnap, rob, and finally murder the Lyons party. Appellant obviously possessed the capacity to engage in violent behavior when it suited his preference.

It is argued that appellant's participation in the murders was relatively minor and that he should not be sentenced to death since he did not specifically intend the victims' deaths. The trial court, however, found as to both Ricky and Raymond Tison:

> "Neither defendant's participation was relatively minor. Although each of the defendants has stated the murders were actually committed by Gary Tison and Randy Greenawalt, the participation of each in the crimes giving rise to the application of the felony murder rule in this case was very substantial. Even accepting as true their statements of who actually fired the fatal shots, it cannot be said that their participation was relatively minor. By their own statements their participation up to the moment of the firing of the fatal shots was substantially the same as that of Randy Greenawalt and Gary Tison. At the moment of the firing their participation may not have equalled that of Randy Greenawalt and Gary Tison, but their standing and watching then [sic] while armed themselves cannot be characterized as relatively minor participation."

The record establishes that both Ricky and Raymond Tison were present when the homicides took place and that they occurred as part of and in the course of the escape and continuous attempt to prevent recapture. The deaths would not have occurred but for their assistance. That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance

that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance. Ricky and Raymond Tison associated themselves with others who were willing to and had in the past committed savage, homicidal acts. They were palpably indifferent to the consequences of their lawless conduct. They will not be relieved of the punishment the law exacts where the criminal association was formed, supported and carried out irrespective of the probable consequences that human life would be taken to ensure the success of the criminal enterprise. We assent to the retributive principle of justice which demands that persons be punished in proportion to their personal involvement in the crime, focusing the inquiry on the harm which may fairly be attributed to a participant's conduct. See U.S. Const. amend. VIII. This is not a case of minimal assistance. Compare Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

If a crime is caused to occur by an accessory but the accessory is not the actual perpetrator, this fact will not alone constitutionally prevent punishment of the accessory to the same extent as the perpetrator since both have caused the death to occur. See Dressler, The Jurisprudence of Death by Another: Accessories and Capital Punishment, 51 U.Colo.L.Rev. 17, 54 (1979). The extent of the accessory's participation was substantial. As a minimum, the Tison brothers stood by, armed with guns, while their companions slaughtered the Lyonses and Theresa Tyson. The

mitigating circumstances are not "sufficiently substantial to call for leniency."

Judgments of conviction and sentences affirmed.

FRED C. STRUCKMEYER, JR.
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

GORDON, Justice (Specially Concurring):

Although I would affirm all the judgments and sentences in this case, I still feel as I did in State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980) that when A.R.S. § 13-454(E) (4) and (5) are read together it is clear that the Legislature intended those sections to apply only to situations involving a homicide committed by a hired killer. I do not believe that they were intended to be applied to homicides occurring in the course of robberies. To that extent I would disagree with the majority.

FRANK X. GORDON, JR.
Justice

**Exhibit B**

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FILED
JUL 9 1981
S. ALAN COOK
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
RAYMOND CURTIS TISON,
Appellant.

No. 4624

Appeal from the Superior Court of Yuma County
Cause No. 9299
Honorable Douglas W. Keddie, Judge

AFFIRMED

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Arizona Civil Liberties Union,
National Council of the Churches of Christ
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The American Baptist Churches in the U.S.A.

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STRUCKMEYER, Chief Justice

This is an appeal by Raymond Curtis Tison from judgments of guilty to four counts of murder in the first degree and sentences of death thereon, two counts of armed robbery, three counts of kidnapping, and one count of theft of a motor vehicle. It is a companion case to that of Ricky Wayne Tison, No. 4612, decided this date. Judgments and sentences affirmed.

On July 30, 1978, appellant and his two brothers, Ricky and Donald Tison, visited the Arizona State Prison at Florence, Arizona. Appellant went to the north annex, ostensibly to see his father, Gary Tison, who was serving a life sentence for murder. Gary Tison's cellmate, Randy Greenawalt, another convicted murderer, was close by in the control room. Appellant's two brothers, Ricky and Donald Tison, while in the yard office of the annex, took out guns which had been concealed in an ice chest. Greenawalt was given a gun and he passed it to Gary Tison. The guards who were present and some prison visitors were locked in a storage closet. The Tisons, with Greenawalt, then left the prison in an escape.

On August 6, 1978, an abandoned Lincoln Continental was found near Quartzsite, Arizona. The body of John Lyons was found near the vehicle and the bodies of Donnelda Lyons, his wife, and their twenty-two-month-old son, Christopher, were found inside the car. Another body, that of Theresa Tyson, the Lyonses' niece, was found one-fifth of a mile west of the vehicle. It was established that the Lyonses had left their home in Yuma, traveling toward Las Vegas, Nevada, in a late model Mazda on the evening of July 31, 1978. This vehicle was eventually found partially buried and covered with pine tree branches near Flagstaff, Arizona.

In the early morning hours of August 11, 1978, appellant, together with Ricky Tison and Randy Greenawalt, was captured near Casa Grande, Arizona after a high speed chase. They attempted to

run a roadblock in a stolen Ford van. All were armed with weapons. During the capture, Donald Tison, the driver of the van, was shot in the head. Gary Tison fled into the desert and was found dead a few days later.

Appellant was tried along with Greenawalt and Ricky Tison in Pinal County, Arizona for crimes occurring at the prison and at the roadblock. Appellant was convicted of seventeen counts of assault with a deadly weapon, possession of a stolen motor vehicle, unlawful flight from a pursuing law enforcement vehicle, and aiding and assisting an escape. These convictions were affirmed by this Court in State v. Greenawalt, et al. on the 24th day of February, 1981, ____ Ariz. ____, 626 P.2d 118 (1981).

The convictions being upheld here resulted from a trial in Yuma County, conducted immediately following the trials first of Greenawalt and then of Ricky Wayne Tison. Greenawalt's convictions for murder, armed robbery, kidnapping and theft of a motor vehicle and sentences were affirmed by this Court in State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Ricky Wayne Tison's appeals from convictions for similar offenses were resolved this day in Cause No. 4612.

Appellant has presented twenty-two assignments of error, most of which do not differ from those asserted and resolved in the companion case of State v. Ricky Wayne Tison, ____ Ariz. ____, ____ P.2d ____(1981)(No. 4612, filed this date). The similarity of the issues in the two cases was recognized by counsel for Raymond Curtis Tison in his motion to consolidate oral arguments:

> "The two cases have a number of issues in common, including all of the conspiracy issues, felony-murder issues, vicarious liability questions, and death penalty issues, over which separate oral argument would be redundant."

We therefore find it unnecessary to reconsider the following issues which were discussed and resolved in State v. Ricky Wayne Tison, Cause 4612, supra: (1) that the plea agreement should be specifically enforced against the State, since it improperly compelled the appellant to withdraw from the agreement; (2) that an expert should have been appointed to conduct a public opinion survey; (3) that the trial court erred in giving the conspiracy instructions when the prosecution relied on the theory of aiding and abetting to impose criminal liability; (4) that the trial court erred in the conspiracy instructions given because Arizona law does not recognize vicarious liability for the acts of a co-conspirator; (5) that it was fundamental error for the trial court to fail to instruct the jury on the elements of the crime of conspiracy; (6) that the trial court erred by failing to instruct on the elements of escape from legal custody and avoidance or prevention of lawful arrest contained in the felony murder statute; (7) that the trial court erred in failing to instruct on termination of a felony underlying application of the felony murder rule; (8) that the trial court erred in failing to provide transcripts of co-defendant Randy Greenawalt's trial, see State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981); (9) that the sentencing judge erred in his interpretation of the aggravating circumstances contained in A.R.S. § 13-454(E) (now § 13-703(F)); (10) that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (11) that the decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924 (1979), is unconstitutional because the mitigating portions of the statute are not severable from the remainder of the statute; (12) that State v. Watson, supra, constitutes a prohibited exercise of legislative power in violation

of Article III of the Constitution of Arizona; (13) that State v. Watson, supra, constitutes a judicial enactment of a bill of attainder prohibited by Article I, Section 10 of the United States Constitution; (14) that the death penalty as re-created by State v. Watson, supra, will be imposed wantonly, arbitrarily and freakishly because it contains no ascertainable standards for the sentencing body to measure the relative weights of the aggravating and mitigating circumstances; (15) that the death penalty statute improperly allocates the burden of proof in requiring the defendant to prove the existence of mitigating factors and not requiring the prosecution to establish aggravating circumstances beyond a reasonable doubt; and (16) that the imposition of the sentence of death upon an individual convicted under a felony murder theory without evidence that he was the actual perpetrator of the homicide or intended that the victim should die is grossly disproportionate and violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.

Our resolution here of the above enumerated issues is identical to their resolution in State v. Ricky Wayne Tison, supra.

In addition, appellant urges that as a result of the pretrial publicity, the trial court erred in denying his motions for change of venue, change of venire, continuance, sequestration of the jury and for individual voir dire. We will examine these assertions in the light of the established law that the determinations rest within the sound discretion of the trial court and will not be disturbed on appeal lacking a clear showing of abuse of discretion and resulting prejudice. State v. Ricky Wayne Tison, supra; State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981); State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981).

It is appellant's position that pretrial publicity had so "permeated the commun cy" and was so prejudicial that a change of venue was necessitated. He points to the fact that every member of the jury panel had some knowledge of the case.

In State v. Schmid, 107 Ariz. 191, 484 P.2d 187 (1971), this Court recognized that prior knowledge concerning a case by all of the empaneled jurors was an important factor for the trial judge to consider in ruling on the motion for change of venue, but that standing alone it did not demonstrate such prejudice as would necessitate a change of venue. The grounds for change of venue require the movant to show that pretrial publicity has the probable effect of precluding a trial by fair and impartial jurors. State v. Ricky Wayne Tison, supra; State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Nothing approaching such a showing was made by appellant. Of the 50 prospective jurors that needed to be called to obtain a panel of 34, 16 expressed an unqualified opinion as to the guilt of the accused. These prospective jurors were excused and the remaining members of the panel, even though possessing some knowledge of the case, stated that they could try the case on the evidence presented in court. It is unnecessary for a juror to be totally ignorant of the facts of a case so long as he can lay aside his impressions or opinions and render a verdict based on the evidence before him. State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979). While the assurances of impartiality by the jurors are not dispositive on the question of actual prejudice toward the defendant, in the absence of any showing of the probability of an unfair trial we will not upset the trial judge's ruling on the motion for change of venue. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). See State v. Greenawalt, et al., 626 P.2d 118, 122 (1981).

The appellant asserts that error was committed because the jury was not sequestered. He believes this procedure should have been adopted in order to prevent the jury from being exposed to the "massive publicity surrounding the trial." We do not agree. The record does not reflect the presence of such publicity, nor does it show jury misconduct or that the jury failed to follow the admonitions given by the trial judge.

Appellant claims the trial court erred in failing to conduct individual voir dire. The primary responsibility for the voir dire examination rests with the trial judge. See State v. Ricky Wayne Tison, supra, but if good cause appears, the court may permit counsel to examine an individual juror. Rule 18.5, Rules of Criminal Procedure, 17 A.R.S. This opportunity to ask questions of individual jurors was afforded counsel for appellant and he declined to do so. We will not disturb the trial court's selection of the jury in the absence of a showing that a jury of fair and impartial jurors was not chosen.

Appellant urges that he was denied a fair trial guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and characterized the pretrial publicity as "unchecked and irresponsible journalism" which created a carnival-like atmosphere similar to the one condemned in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). He then points to specific items of media coverage which he believes reflect the extreme prejudicial conditions under which this trial was conducted. He complains of the press coverage concerning his involvement in the prison breakout of Gary Tison and Randy Greenawalt, his initial agreement to plead guilty and receive a life sentence in exchange for his testimony against co-defendant Greenawalt, his alleged confession, the

physical evidence connecting appellant to the deaths of the Lyons family and Theresa Tyson, the listing of the names of witnesses in the Greenawalt trial who would most probably testify at appellant's trial, and the opinions of appellant's guilt in editorials and letters to the editor in various newspapers.

In State v. Schmid, 109 Ariz. 349, 509 P.2d 619 (1973), supra, we recognized that certain publicity similar to that described above could create prejudice to the extent of precluding the possibility of a fair trial. But to presume prejudice, outrageous circumstances must be present showing the lack of solemnity and sobriety appropriate to a judicial proceeding. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Upon reviewing the record, we find nothing resembling such extreme circumstances. See Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

We now turn to an examination of the actual publicity in the case to ascertain, first, if it reached prospective jurors and, second, if it was so prejudicial that the jurors could not have set it aside. State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981). A review of the nature of the publicity and the relative difficulty in selecting the jury can indicate the presence of actual prejudice. Id. It cannot be disputed that appellant's activities, together with the other Tisons', received massive publicity from the break out of the state prison until their capture near Casa Grande, some twelve days later. Thereafter, the Tisons and Greenawalt received less attention in the press. The only inflammatory articles which could possibly be considered prejudicial were two appearing in the Arizona Republic, a newspaper published in Phoenix, Arizona, nearly 200 miles from Yuma, the site of the trial.

On Wednesday, August 8, 1978, an editorial appeared in the Arizona Republic, entitled "Society Has Had It!" The tenor of the editorial is set in the first five sentences, which read:

> "BLEEDING-HEART critics of the death penalty peg their case on the vacuous assertion that capital punishemnt is no deterrent to heinous crimes.
>
> Let them come down from their lofty perches and tell that to the survivors of Marine Corps Sgt. John H. Lyons, 24, his wife, Danellda [sic], 23, and their son Christopher, 22 months.
>
> They were found beside a highway near Quartzsite, riddled with pellets from repeated shotgun blasts.
>
> Police are almost certain they were gunned down by two escaped Arizona prison inmates, Gary Tison, 43, and Randy Greenawalt, 28.
>
> Now how does death penalty deterrence figure in this crime?"

On Wednesday, August 16, 1978, a column by Paul Dean of the Arizona Republic commenced in this fashion:

> "The voice of the people is a towering yell.
>
> More than 300 letters and telephone calls to me and to the editors of this newspaper have formed an angry appeal for protection from Greenawalt and the Tisons and the bestiality they are charged with performing, may be continuing and could inspire others."

It was established that some of the prospective jurors read the Arizona Republic. These newspaper articles, however, appeared approximately six months prior to the date of trial. The ease with which a jury was selected strongly tends to suggest that publicity-caused prejudice did not extensively pervade the community nor influence jurors to the point of prejudicing appellant. While 16 of the 50 prospective jurors acknowledged that they were prejudiced against appellant, many were unaware of statements attributed to the appellant which had the greatest potential for the creation of jury prejudice. The circumstances

were such that we do not find actual prejudice permeated the jury panel to the extent that appellant was deprived of a fair trial.

For similar reasons the court did not err in denying appellant's motions for change in the venire and for a continuance of the trial.

The appellant argues that the evidence presented by the State was not sufficient to support convictions for armed robbery, kidnapping and theft of a motor vehicle.

On appeal, this Court will not engage in re-weighing the evidence. State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); State v. Long, 121 Ariz. 280, 589 P.2d 1312 (1979); State v. Acree, 121 Ariz. 94, 588 P.2d 836 (1978). It will be viewed in the light most favorable to sustaining the conviction and all reasonable inferences will be resolved against a defendant. State v. Verdugo, 109 Ariz. 391, 510 P.2d 37 (1973). The test to be applied is whether there is substantial evidence to support a guilty verdict. State v. Childs, 113 Ariz. 318, 553 P.2d 1192 (1976). In the recent case of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), it was held that due process requires a court to utilize as the standard of review whether there was sufficient evidence that a rational trier of fact could have found guilt beyond a reasonable doubt. The Court said:

> "After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Woodby v. INS, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362. Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 U.S. 356, 362, 92 S.Ct. 1620, 32 L.Ed.2d 152. This familiar standard

> gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the fact-finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." 443 U.S. ____, 99 S.Ct. at 2789-2790. (Footnotes omitted.) (Emphasis in original.)

In Arizona, the substantial evidence test applied to reviews on appeal is consistent with the constitutional principles enunciated in Jackson v. Virginia, supra. The manner in which we have defined the term "substantial evidence" supports this conclusion. We have said it means "* * * more than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." State v. Bearden, 99 Ariz. 1, 4, 405 P.2d 885 (1965). (Citations omitted.) This approach equates with the mandate in Jackson requiring the reviewing court to find that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. See State v. Robinson, 288 N.W.2d 337 (Iowa 1980). See also Davis v. United States, 385 F.2d 919 (5th Cir. 1967). Other jurisdictions with a standard of review similar to our own have reached the same conclusion. See People v. Johnson, 26 Cal.3d 557, 606 P.2d 738, 162 Cal.Rptr 431 (1980); State v. Lagasse, 410 A.2d 537 (Me. 1980); Wilkins v. State, 609 P.2d 309 (Nev. 1980); Hauger v. State, 405 N.E.2d 526 (Ind. 1980); State v. Robinson, supra; People v. Calvaresi, 600 P.2d 57 (Colo. 1979); State v. Brown, 80 N.J. 587, 404 A.2d 1111 (1979); State v. Atkins, 261 S.E.2d 55 (W.Va. 1979), cert. denied 100 S.Ct. 1081 (1980). Those jurisdictions which have not specifically examined their

standard in the light of the holding in Jackson have embraced it as a new standard for reviewing the sufficiency of evidence. See State v. Filson, 101 Idaho 381, 613 P.2d 938 (1980); People v. McDonald, 409 Mich. 110, 293 N.W.2d 588 (1980); State v. Letterman, 603 S.W.2d 951 (Mo.App. 1980); State v. Hardy, 419 A.2d 398 (N.H. 1980); State v. Harris, 288 Ore. 703, 609 P.2d 798 (1980); Young v. State, 407 A.2d 517 (Del. 1979); Moore v. State, 151 Ga.App. 120, 258 S.E.2d 917 (1979); State v. Voiles, 226 Kan. 469, 601 P.2d 1121 (1979); State v. Abercrombie, 375 So.2d 1170 (La. 1979); State v. Rusk, 289 Md. 230, 424 A.2d 720 (1981); State v. Barbour, 43 N.C.App. 143, 258 S.E.2d 475 (1979); Holt v. State, 591 S.W.785 (Tenn. 1979). Our review function will therefore be concerned with whether there exists substantial evidence from the entire record from which a rational trier of fact could have found guilt beyond a reasonable doubt.

Appellant was held responsible for these crimes through the application of A.R.S. § 13-139 (now A.R.S. § 13-301). Liability as a principal is predicated upon proof that a defendant was concerned in the commission of a crime whether directly committing the crime or aiding and abetting its commission. Aiding and abetting presupposes active participation in the offense or advice or encouragement in the commission and a corresponding intent to facilitate the perpetration. State v. Bearden, supra.

The evidence introduced by the prosecution clearly supports the appellant's convictions for armed robbery, kidnapping and theft of a motor vehicle under the aiding and abetting theory of criminal responsibility. While there was no direct testimony that appellant actively participated in the commission of these crimes, there was ample circumstantial evidence from which the jury could have reasonably inferred that the appellant had assisted in their commission.

Appellant's fingerprint was found on the door release button of the Lincoln Continental, where two of the victims' bodies were found, thereby strongly suggesting that he was present at the scene of the homicides. Although a defendant's presence at the time and place of the crime in the absence of preconcert does not establish guilt as an aider, abettor or principal, State v. Hernandez, 112 Ariz. 246, 540 P.2d 1227 (1975); State v. Sims, 99 Ariz. 302, 409 P.2d 17 (1965), cert. denied 384 U.S. 980 (1966), an intent to engage in the criminal venture may be shown by the relationship of the parties and their conduct before and after the offense. State v. Beard, 107 Ariz. 388, 489 P.2d 25 (1971); State v. Villegas, 101 Ariz. 465, 420 P.2d 940 (1966); State v. Parker, 121 Ariz. 172, 589 P.2d 46 (App. 1978).

It is clear that appellant and his brothers were intimately engaged in a scheme designed to free their father from imprisonment. It can be reasonable to infer that their goal did not change from the time of the initial active assistance in breaking out of the prison through their capture eleven days later. The uncontradicted evidence established that appellant, along with his brother Ricky, made the arrangements with their uncle, Joe Tison, to obtain the automobile and various weapons which were used in the prison breakout. Appellant actively participated in the escape by bringing weapons into the trustee control annex, by holding prison guards and others at gunpoint, and fleeing in the company of his father, his brothers and Greenawalt.

The testiomony of a Wenden, Arizona store clerk established that appellant was in Yuma County on August 1, 1978, at a time shortly after the homicides were committed. He and his brothers purchased silver spray paint which was used to disguise the Lyonses' stolen Mazda near Flagstaff. On August 2, 1978, appellant

was seen in Flagstaff near the location of the partially buried, stolen Mazda. Finally, on August 11, 1978, appellant, together with Greenawalt and Ricky Tison, were captured after a high speed chase near Casa Grande. In the light of this evidence, it is reasonable for the jury to have inferred that appellant was not only present at the scene of the crimes, but willingly participated in the doing of whatever was necessary to complete the escape and to prevent capture. Appellant had eleven days after the breakout to disassociate himself from further participation in the criminal venture, but he did not. The jury could have readily concluded beyond a reasonable doubt that appellant was more than an abettor but was, rather, a direct participant in commission of the robbery, kidnapping and theft.

Finally, evidence of the appellant's flight supports an inference that the appellant was guilty of the offenses. He did not simply leave the scene of the crimes, for this, alone, would not support an inference of guilt. See State v. Ceja, 113 Ariz. 39, 546 P.2d 6 (1976), appeal after remand 115 Ariz. 413, 565 P.2d 1274, cert. denied 434 U.S. 975 (1977). Rather, appellant and his companions repeatedly changed motor vehicles and sought to conceal the change by abandoning the Lincoln some distance off the highway, camouflaging the Mazda with paint and pine branches, and by abandoning at a Chevrolet dealership in Colorado the four-wheel-drive pickup obtained in Flagstaff. At the roadblock in Pinal County, Arizona, appellant, to avoid being apprehended, ran into the desert with Greenawalt and his brother Ricky. Flight to avoid capture is circumstantial evidence of the guilt of an accused. State v. Sorensen, 104 Ariz. 503, 455 P.2d 981 (1969).

The circumstantial evidence when examined as a whole did provide the jury with sufficient evidence from which it could have

found appellant guilty beyond a reasonable doubt of armed robbery, kidnapping and theft. The lack of direct evidence of guilt does not preclude such a conclusion since a criminal conviction may rest solely upon proof of a circumstantial nature, State v. Carriger, 123 Ariz. 335, 599 P.2d 788 (1979), cert. denied 444 U.S. 1049 (1980). It is unnecessary for the prosectuion to negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence. State v. Olivas, 119 Ariz. 22, 579 P.2d 60 (App. 1978).

The evidence at Raymond's trial relating to the location of the bodies and wounds was similar to that introduced at Ricky's trial. For the reasons set forth in State v. Ricky Wayne Tison (No. 4612), supra, we are not convinced "a grave risk of death" was created to others, and hold here, as we did there, that the aggravating circumstance to be found in A.R.S. § 13-454(E)(3) does not apply.

The aggravating circumstance to be found in A.R.S. § 13-454 (E)(5) is, however, clearly established. The bodies of the victims were in and around the Lincoln Continental which had been used by appellant and his companions in the escape. After its abandonment, they left the scene of the homicides in the Lyonses automobile. Considering all the facts, the conclusion is justified that the homicides were committed to secure a vehicle with which to continue their flight.

We agree with the trial judge's finding that the murders were "committed * * * in an especially heinous * * * or depraved manner", A.R.S. § 13-454(E)(6). One of the victims was a twenty-two-month-old child held in the arms of his mother. We reject the appellant's argument that this aggravating circumstance can be found only if he actually committed the murders. Appellant is in effect saying

that since he did not personally pull the trigger of the guns used to commit the homicides, he cannot be held responsible for committing the offenses in an especially heinous, depraved manner.

As in the case of Ricky Tison, the trial judge found in mitigation of the offenses appellant's age, his minimal prior criminal activity, and that his convictions were based on the felony murder rule, former A.R.S. § 13-452. Appellant argues mitigation also exists in that he was strongly manipulated by his father, Gary Tison, pointing to the psychological reports on his mother and himself.

The psychologist did find a "very subtle sense of emotional manipulation on the part of" appellant's father, Gary Tison, which may have contributed in part to appellant's "amoral and somewhat antisocial development * * *." The psychologist concluded appellant "was not, in my opinion, operating under any irresistible impulse or irrestible urge" and did not conclude that appellant was under undue influence or duress.

Because the law is egalitarian, all persons are held accountable for the results of their conduct, it being presumed that all possess a free will. See Dressler, The Jurisprudence of Death by Another: Accessories and Capital Punishment, 51 U.Col.L.Rev. 17 (1979). Even though Gary Tison had significant influence with appellant, the evidence does not support the notion that appellant's will was overwhelmed or that appellant was anything other than a willing participant in the escape and the subsequent events. The sentencing judge did not find Gary Tison's influence or "subtle * * * manipulation" to be "sufficiently substantial to call for leniency." Nor do we.

Neither do we find the letters written on behalf of appellant, to the effect that he was essentially a peaceful person, of much

value in light of the evidence that appellant exhibited his willingness to use force and violence at the time of the prison breakout and on subsequent occasions by violent criminal conduct. Even the psychological report offered in mitigation revealed appellant's potential for violence:

> "Raymond * * * felt almost certainly that if they became involved with legal authorities or were near capture that a shooting incident would occur. He stated that in terms of innocent civilians being injured that it was most unfortunate but that his father was in charge. His father was running it like 'a military operation and there were no survivors -- you know, that sort of thing -- no witnesses.'"

Appellant points to his limited participation in the murders. To prove his limited participation, he joined with Ricky Tison in arguing that Ricky's statement showed that neither he nor Ricky engaged in the actual shooting nor did they intend the deaths of the victims. In upholding the sentence and conviction of Ricky Tison, we said as to both brothers that the non-participation in the shooting was not controlling since both took part in the robbery, the kidnapping, and were present assisting in the detention of the Lyonses and Theresa Tyson while the homicides were committed.

The mitigating circumstances when considered separately and collectively are not sufficiently substantial to call for leniency.

Appellant complains that he did not receive a fair trial because he was denied effective assistance of counsel. Since State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied 385 U.S. 1043 (1967), the standard in Arizona has been whether counsel was so ineffective that the proceedings were reduced to a farce, sham or mockery of justice. Recently, in State v. Williams, 122 Ariz. 146, 593 P.2d 896, we recognized that many jurisdictions have discarded the farce, sham or mockery of justice

test and have adopted the reasonably effective assistance of counsel standard. We have not adopted the reasonably effective assistance of counsel as the test. Nevertheless, after examining the record, we find no indication that trial counsel's efforts were inadequate judged by either standard. See State v. Moreno, ___ Ariz. ___, 625 P.2d 320 (1981); State v. Flewellen, ___ Ariz. ___, 621 P.2d 29 (1980).

The burden of establishing the ineffectiveness of trial counsel is upon a claimant, State v. Pacheco, 121 Ariz. 88, 588 P.2d 830 (1978); see State v. Watson, 114 Ariz. 1, 559 P.2d 121 (1976), and proof of ineffectiveness must be a demonstrable reality not merely a matter of speculation. See State v. Daniel, 25 Ariz.App. 592, 545 P.2d 440 (1976); People v. Stephenson, 10 Cal.3d 652, 517 P.2d 820, 111 Cal.Rptr. 556 (1974). Moreover, errors in trial tactics or strategy per se do not constitute inadequate representation. State v. Flewellen, supra; State v. Dippre, 121 Ariz. 596, 592 P.2d 1252 (1979); State v. Farni, 112 Ariz. 132, 539 P.2d 889 (1975).

Appellant asserts that his trial counsel inadequately cross-examined the witnesses for the State. But, as the State points out, counsel for appellant did engage in cross-examination of several witnesses, exposing inconsistencies in their testimony. In hindsight, we see no indication that the questioning of the State's witnesses was inadequate. But were it otherwise, the manner in which cross-examination is conducted is a tactical decision to be made by the lawyer. See Standard 4-5.2, A.B.A. Standards for Criminal Justice. The method utilized is not indicative of inadequate representation. See State v. Farni, supra.

Appellant claims that counsel's "failure to fully argue his case to the jury at the conclusion of the trial" shows ineffective

representation. Counsel did argue that guilt had not been proven beyond a reasonable doubt in the light of the failure of the State to prove the extent of appellant's participation in the homicides. The failure to engage in a lengthy closing argument does not necessarily show incompetence, since silence by trial counsel may be the most effective trial tactic. See State v. Martinez, 19 Ariz.App. 417, 508 P.2d 82, cert. denied 414 U.S. 1027 (1973).

Appellant asserts that it was error for counsel to fail to individually examine prospective jurors. Appellant's argument overlooks the fact that the questioning carried out by the trial judge could have been adequate in counsel's judgment. Moreover, the decision to ask additional questions may be in part predicated on strategy and, hence, one which rests peculiarly within the province of counsel. The failure to ask unnecessary questions is not indicative of ineffective representation. See Gustave v. United States, 627 F.2d 901 (9th Cir. 1980).

Finally, the appellant asserts that he received only a minimal defense. He does not point out, however, what more could have been done which would support his claim. Considering the record of appellant's trial as a whole and the prosecution's evidence, we do not believe that counsel was ineffective as an attorney or that he presented a lackluster defense. If the assertion of ineffective assistance of counsel on the grounds of a minimal effort is made, the record should establish where

further effort would have been to a defendant's advantage. See State v. Rackley, 106 Ariz. 424, 477 P.2d 255 (1970).

Judgments and sentences affirmed.

FRED C. STRUCKMEYER, JR.
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

FRANK X. GORDON, JR., Justice

**Exhibit C**

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

| | |
|---|---|
| STATE OF ARIZONA,<br><br>Plaintiff,<br><br>vs.<br><br>RICKY WAYNE TISON and<br>RAYMOND CURTIS TISON,<br><br>Defendants. | NO. 9299 |

Yuma, Arizona

BEFORE: THE HONORABLE DOUGLAS W. KEDDIE
Judge of the Superior Court
Division Three, Yuma, Arizona.

AGGRAVATION HEARING
AND
SENTENCING

SUPERIOR COURT
YUMA, ARIZONA

March 29, 1979
9:00 a.m.

SENTENCING

APPEARANCES: MICHAEL IRWIN, Yuma County Attorney, For the State.

MICHAEL BEERS, Attorney at Law, Casa Grande, Arizona, For Defendant Ricky Tison.

HARRY BAGNALL, Attorney at Law, Coolidge, Arizona, For Defendant Raymond Tison.

THE COURT: Number 9299, the State of Arizona versus Ricky Wayne Tison and Raymond Curtis Tison. This matter comes on for pronouncement of judgment and sentence at this time. Before doing so it is necessary that I render a special verdict regarding aggravating and mitigating circumstances. Does the State have anything to add?

MR. IRWIN: Your Honor, the arguments and the position of the State as to the law that applies in this matter has been set forth in the memorandum which has previously been submitted to the Court. We have nothing to add to that at this time.

THE COURT: Mr. Beers, on behalf of the defendant Ricky Tison do you have anything to add?

MR. BEERS: Regarding the aggravating and mitigating circumstances my position is clearly laid out from the memorandum. I have nothing to add to that.

THE COURT: Mr. Bagnall.

MR. BAGNALL: Since I adopted in principle all of the matters contained in the memorandum of Mr. Beers I merely concur in that and call the Court's attention to the memorandum which I submitted on the one question.

THE COURT: Yes, they have been fully considered. Did you want to make that other exhibit a part of the record?

MR. BEERS: Yes, Your Honor, I would. There is a copy of the presentence report prepared by Carl Cansler and I would like it marked.

THE COURT: And you wish it noted that specifically you object to those portions you have underlined in red?

MR. BEERS: Yes, Your Honor. I object to them and I think they are misinterpretation of the facts and I think it could have been cleared up had Mr. Cansler spoken directly to Ricky. He was advised that Ricky was willing to speak to him on March 15.

THE COURT: All right. Let the record note that the matters referred to are conclusions and simply interpretations made by the probation officer.

MR. BAGNALL: I would say one thing further, Your Honor, with respect to the report by the probation officer that reading into it it seems protagonistic towards the position taken by the county attorney.

THE COURT: All right. Pursuant to A.R.S. Section 13-454 C in which the Court returns a special verdict of its findings of the existence or nonexistence of aggravating circumstances as set forth in 13-454 E and of any mitigating circumstances.

Respecting aggravating circumstances. The only information relevant to any of the aggravating circumstances set forth in section 13-454 E which has been considered by this Court in making these findings concerning aggravating circumstances as to each defendant is that received in evidnce at his trial on the murder charges and that received in evidence on these charges at the sentencing hearing conducted March 14, 1979. And specifically in that regard presentence reports have not been considered in making these findings of aggravating circumstances.

The Court finds these aggravating circumstances are present:

In the commission of the murders of John Lyons and Donnelda Lyons, the defendants knowingly created a grave risk of death to other persons in addition to those victims. The person or persons among the defendants who fired the fatal shots fired indiscriminately and excessively as evidenced by the number of spent shotgun shell casings found in the immediate vicinity of the Lincoln and the number of fatal wounds sustained by John Lyons and Donnelda Lyons. The location of the fatal wounds of John Lyons and Donnelda Lyons, head and chest wounds, contrasted

with the fatal hip wound sustained by Teresa Tyson, is evidence that Teresa sustained that wound as a result of the indiscriminate shooting. The position of the body of Christopher Lyons standing between his mother's legs and his fatal head wound is consistent with finding his wound was incidental to his mother's fatal chest wound.

Two. The defendants committed the offenses as consideration for the receipt or in the expectation of the receipt of something of pecuniary value, namely, the taking of the automobile and other property of the victims John and Donnelda Lyons.

Three. The defendants committed the offenses in an especially heinous, cruel and depraved manner. This finding is based on the evidence that the victims' vehicle was stopped, they and they vehicle were moved from the highway into the desert, and some, if not all, of the victims, were placed in the Lincoln automobile where at least Donnelda Lyons and Christopher Lyons were murdered. Clearly the fatal wounds of John Lyons and Teresa Tyson were inflicted in or near the Lincoln. The conclusion is inescapable that all the victims were moved from the highway under force and, considering the arsenal possessed by the defendants and the manner in which the victims were killed, very probably at gunpoint. Necessarily John Lyons, Donnelda Lyons and Teresa Tyson had time to become and must have become apprehensive about their welfare and that of Christopher at first and ultimately about all their lives before the fatal shots were fired. The

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stress and fear each must have initially experienced had to have grown to immence, almost unimaginable proportions before they were murdered. And it is not unreasonable to conclude that one or more of the victims witnessed the murder of the others before his or her turn came, and that very likely, from where they were found, Teresa Tyson and John Lyons were those witnesses. The emotions certainly experienced by John Lyons, Donnelda Lyons and Teresa Tyson in those last minutes of their lives were the equivalent of the severest physical torture.

This finding is also based on the senselessness of the murders. It was not essential to the defendants' continuing evasion of arrest that these persons were murdered. The victims could easily have been restrained sufficiently to permit the defendants to travel a long distance before the robberies, the kidnappings, and the theft were reported. And in any event the killing of Christopher Lyons, who could pose no conceivable threat to the defendants, by itself compels the conclusion that it was committed in a depraved manner.

Four. The defendants have not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable which this Court can consider here. The related convictions in Pinal County in December, 1978, of each defendant of 17 counts of assault with a deadly weapon are not being ignored. Clearly they are crimes punishable by life imprisonment. However, if all of the

criminal acts of the defendants, commencing with the prison escape and ending with their apprehension, had been committed in one county of this State, very probably all of the charges would have been included in a single indictment or information. Had they been tried and convicted on all charges in one trial in that one county, would it be reasonable now to include the assault convictions as an aggravating circumstance? I think not, and I do not believe the legislature intended that result. The murder convictions were based in part on the murders occurring during the continuing efforts of the defendants to prevent lawful arrest and to aid the continuing escape of Gary Tison and Randy Greenawalt. Hence all convictions were a part of the escape and prevention of lawful arrest. In not including the assault convictions as an aggravating circumstance, I also note that the convictions in Pinal County occurred before the murder convictions here simply because Pinal County trial was scheduled for an earlier date than the trial here.

Five. The defendants have not previously been convicted of a felony in the United States involving the use of threat or violence on another person which this Court can consider. Again the Pinal County convictions are noted and are not considered a previous conviction for the reasons above stated.

Six. The defendants did not procure the commission of the offenses by payment or promise of payment of anything of pecuniary value.

Regarding mitigating circumstances, all information relevant to any mitigating circumstances, including but not limited to those set forth in 13-454 F, contained in the presentence report, presented at the sentencing hearing, received in evidence at the trials of the defendants and contained in transcribed statements taken January 26, 1979 and February 1, 1979 of each of the defendants has been considered by the Court. The Court finds none of the mitigating circumstances prescribed in 13-454 F are present, namely:

1. Neither defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired.

2. Neither defendant was under unusual and substantial duress.

3. Neither defendant's participation was relatively minor. Although each of the defendants has stated the murders were actually committed by Gary Tison and Randy Greenawalt, the participation of each in the crimes giving rise to the application of the felony murder rule in this case was very substantial. Even accepting as true their statements of who actually fired the fatal shots, it cannot be said that their participation was relatively minor. By their own statements their participation up to the moment of the firing of the fatal shots was substantially the same as that of Randy Greenawalt and Gary Tison. At the moment of the firing

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their participation may not have equalled that of Randy Greenawalt and Gary Tison, but their standing and watching them while armed themselves cannot be characterized as relatively minor participation.

4. Each defendant could reasonably have foreseen that his conduct in the course of the commission of the offenses for which he was convicted would cause or create a grave risk of causing death to another person.

There are mitigating circumstances present. They are:

1. The youth of the defendants, Ricky being 20 years of age and Raymond being 19 years of age.

2. The defendants have no prior felony convictions and their criminal activity before July 30, 1978 was very minimal.

3. They have been convicted of four murders under the felony murder instructions.

All references in this special verdict to the Arizona Revised Statutes are to the sections of those statutes as they were numbered at the time of the commission of the offenses and prior to October 1, 1978.

Included in the presentence report and considered by me was a psychological evaluation of the defendants' mother which defense counsel specifically requested this Court consider. That evaluation is now sealed, made a part of the record, and will be opened

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only on order of this Court or any appellate court.

Ricky Tison and Raymond Tison, you were charged by indictment with the commission of the crimes of four counts of murder in the first degree, two counts of armed robbery, four counts of kidnapping, and one count of theft of a motor vehicle, to which charges you entered pleas of not guilty. Thereafter the kidnapping of Christopher Lyons charge was dismissed. On the 27th day of February, 1979, as to Ricky Wayne Tison, and on the 6th day of March, 1979, as to Raymond Curtis Tison, after a trial by jury, verdicts of guilty were returned against each of you for the commission on or about August 1, 1978, of the crimes of: murder in the first degree of John F. Lyons, murder in the first degree of Donnelda Lyons, murder in the first degree of Christopher Lyons, murder in the first degree of Teresa Jo Marie Tyson, kidnapping of John F. Lyons, kidnapping of Donnelda Lyons, kidnapping of Teresa Jo Marie Tyson, armed robbery of John F. Lyons, armed robbery of Donnelda Lyons, and the theft of a motor vehicle with the intent to permanently deprive the owner of its possession.

Have you any legal cause to show, Mr. Beers, why judgment should not now be pronounced?

MR. BEERS: None except for the objections I have already noted in the presentence report.

THE COURT: Very well. Mr. Dagnall?

MR. BAGNALL: I have no objections other than my notations. Also I would ask the Court if the Court is in a position to hear a statement from either one of the defendants at this time?

THE COURT: Yes. First of all, Mr. Beers, do you wish to be heard further?

MR. BEERS: Just very briefly, Your Honor. I have explained my position fully in the memorandum. I feel when all the factors are considered that the death penalty is not appropriate for either of these boys. I have listed factors in my memorandum. I don't think I have exaggerated anything and I think when the Court looks at all the circumstances how the murders took place, the background of these boys, I think that the Court does have reason to show leniency in this case. That's all I have to say.

THE COURT: Ricky, do you have anything you wish to say?

RICKY TISON: Just that it tears me up that that family was killed. It's something that I won't forget.

THE COURT: Mr. Bagnall?

MR. BAGNALL: If it please the Court, I feel that Mr. Beers' memorandum completely refuted the memorandum issued by the county attorney's office. And regarding the evidence produced at the aggravation-mitigation hearing, all the evidence presented by the State of Arizona was presented as to matters which

are ex post facto and therefore I should think should have no, absolutely no bearing on the case.

I do believe that as I stated before that the probation officer's report's conclusions were excessively protagonistic on behalf of the position taken by the State of Arizona through the county attorney. and I ask that Mr. Raymond Tison be allowed to advise the Court of his own position in this matter.

THE COURT: Raymond, you wish to make a statement?

RAYMOND TISON: Well, I just think you should know when we first came into this we had an agreement with my dad that nobody would get hurt because we wanted no one hurt. And when this came about we were not expecting it. And it took us by surprise as much as it took the family by surprise because we were not expecting this to happen. And I feel bad about it happening. I wish we could do something to stop it, but by the time it happened it was too late to stop it. And it's just something we are going to live with the rest of our lives. It will always be there.

THE COURT: No legal cause having been shown why judgment and sentence should not now be pronounced against the defendants it is the judgment of the Court that you be punished for these crimes in the following manner - - consideration has been given to time already spent in custody:

1. For the crime of theft of

a motor vehicle with intent to deprive the owner of its possession permanently, by commitment to the Department of Corrections of the State of Arizona for a term of not less than four nor more than five years to commence from this date.

2. For the crime of robbery of John F. Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than 50 years nor more than life to commence on this date.

Number three. For the crime of robbery of Donnelda Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than 50 years nor more than life to commence on this date.

Number four. For the crime of kidnapping of John F. Lyons by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, commencing on this date.

Number five. For the crime of kidnapping of Donnelda Lyons by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which sentence shall commence on this date.

Number six. For the crime of kidnapping of Teresa Jo Marie Tyson by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which

sentence shall commence on this date.

Number seven. In determining what punishment should be imposed for your convictions of murder of John F. Lyons, Donnelda Lyons, Christopher Lyons and Teresa Jo Marie Tyson, this Court has weighed the aggravating circumstances and the mitigating circumstances set forth in its special verdict. This Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Therefore, each of you is sentenced to death on each of the murders of which you have been found guilty, and you shall be committed to the Department of Corrections of the State of Arizona to carry out that sentence in accordance with the provisions of A.R.S. 13-1654 and 13-1655. References are to those sections of the Arizona Revised Statutes as they were numbered prior to October 1, 1978 and at the time of the commission of the crimes of murder.

Because of the imposition of the death sentence the clerk is directed to enter a notice of appeal on behalf of the defendants. The defendants are advised that they also have a right to appeal any orders of this Court and other convictions. In order to do so you must file a written notice of appeal within 20 days of this date. If you do not do so then you lose your right to appeal.

If you wish to appeal and you cannot afford counsel, counsel will be appointed at no expense to you. And a certified copy of all proceedings

will be furnished at no expense to you. Your right to appeal has been set forth in a form which the clerk will give to your attorneys at this time. You may keep one of the copies. Sign the other one and it will be filed with the Court.

* * *

I, G. M. Byrnes, having been duly appointed as Official Court Reporter herein, do hereby certify that the foregoing pages numbered 1 through 162 inclusive constitute a full, true and accurate transcript of all proceedings had in the above matter, all done to the best of my skill and ability.

DATED this 29th day of May, 1979.

NOTARY PUBLIC

Exhibit D

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

STATE OF ARIZONA,

Appellee,

v.

RANDY GREENAWALT,
RAYMOND CURTIS TISON
and RICKY WAYNE TISON,

Appellants.

No. 4611

FILED
FEB 24 1981
CV

Appeal from the Superior Court of Pinal County
Cause Nos. 7979 & 8007
(Consolidated)
Honorable E. D. McBryde, Judge

AFFIRMED

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Attorneys for Appellant
Ricky Wayne Tison

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Appendix A.

STRUCKMEYER, Chief Justice

This appeal arises from convictions for numerous offenses committed during an escape from the Arizona State Prison in Florence on July 30, 1978, and at a roadblock near Casa Grande on August 11, 1978. We have jurisdiction by A.R.S. § 13-4031. Affirmed.

On July 30, 1978, appellant Greenawalt and Gary Tison, the father of the two other appellants, were incarcerated at the state prison. Greenawalt and Gary Tison were cell mates, serving life sentences for murder. Early that morning, appellant Raymond Tison arrived at the north annex of the prison to visit his father. While these two visited, appellant Greenawalt was in the nearby control room, preparing some prisoners' work rosters. Shortly thereafter, appellant Ricky Tison and his brother, Donald Tison, entered the yard office of the annex, carrying an ice chest. Ricky removed a shotgun from the chest and pointed it at two guards. Donald Tison passed a handgun to Greenawalt, who ordered the two guards to lie on the floor. Greenawalt then passed the gun to Gary Tison and obtained another shotgun. Gary Tison rounded up other guards in the area, escorted them into the yard office and then ordered all of them into a small storage closet. Civilians, who were at the annex to visit other prisoners, were first ordered to stand against a wall. Later they were also taken to the storage closet and locked in with the guards. Greenawalt and the Tisons then fled from the prison.

The five men eluded capture for eleven days, during which time a family of four was murdered near Yuma, Arizona. The convictions and death sentences of appellant Greenawalt for these killings were affirmed in State v. Greenawalt, ___ Ariz. ___, ___ P.2d ___ (1981) (No. 4616, filed January 23, 1981).

In the early morning hours of August 11, 1978, Pinal County sheriffs set up two roadblocks near Casa Grande, Arizona, believing the five men would be traveling through the area. Just before 3:00 a.m., a van approached one of the roadblocks, slowed almost to a stop, then accelerated past the roadblock. Two gunshots were first fired from the van. Later more shots were fired from the van as officers from the roadblock pursued in two police cars. Another roadblock was notified and as the van approached, the officers at the second roadblock heard shots and saw muzzle flashes coming from the van. Believing they were being fired upon, these officers shot at the van. After running the second roadblock, the van turned off into the desert and stopped. In the driver's seat of the van, the pursuing officers found Donald Tison, shot, unconscious and dying. Aided by a helicopter's searchlight, the officers discovered Greenawalt and the two Tison brothers, appellants herein, hiding in the desert close by. No trace was found of Gary Tison until several days later when his body was discovered in a nearby wash.

After a jury trial, appellants were each convicted of seventeen counts of assault with a deadly weapon (A.R.S. § 13-249(B)[1/]) and one count each of possession of a stolen motor vehicle (A.R.S. § 13-672.01) and unlawful flight from a pursuing law enforcement vehicle (A.R.S. § 28-622.01). Appellant Greenawalt was further convicted of escape (A.R.S. § 13-392) and possession of a deadly weapon by a prisoner (A.R.S. § 31-232); while both Tisons were found guilty of aiding and assisting an escape (A.R.S. § 13-391), with Ricky Tison alone being convicted of taking prohibited articles into prison (A.R.S. § 31-230).

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1/ All citations to Title 13, A.R.S. refer to the code as it existed prior to the 1978 revisions.

The Tisons received sentences of 30 years to life for the assaults, the sentences to be concurrent. For the rest of the offenses, they received sentences of four to five years, these sentences to be served concurrently, but consecutively to the assault sentences.

Greenawalt was sentenced to terms of thirty years to life for the thirteen assaults committed during the escape and for possession of a deadly weapon, along with a four to five-year term for escape, the sentences running concurrently. Greenawalt also received sentences of thirty years to life for the roadblock assaults and sentences of four to five years for possession of a stolen motor vehicle and unlawful flight. These latter sentences are to run concurrently to each other, but consecutively to the sentences for the crimes arising out of the prison escape. All the sentences imposed on Greenawalt in this action will run consecutively to the life term he was serving prior to the escape.

Appellants contend the trial judge erred in denying their motion to change venue or venire, grant a continuance or dismiss the indictment, resulting in a denial of their right to a fair trial. The determinations of motions for a change of venue, change of venire and a continuance rest within the trial court's discretion and will not be disturbed on appeal absent a clear showing of abuse of that discretion resulting in prejudice to the defendant. State v. Greenawalt, supra; Rule 10.3(b), Rules of Criminal Procedure, 17 A.R.S.

Appellants argue the media coverage in this case was so outrageous that prejudice and unfairness must be presumed. We recognized this principle in State v. Smith, 123 Ariz. 231, 236, 599 P.2d 187 (1979), yet we found no such outrageous conduct there. Instead, it has only been found where the "proceedings * * * lacked the solemnity and sobriety appropriate to a judicial proceeding, and,

instead * * * developed a carnival-like atmosphere." State v. Greenawalt, supra, at ____; see Dobbert v. Florida, 432 U.S. 304, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Appellants point to nothing as evidence that their trial was conducted in a less than solemn and sober manner. The record itself discloses no outrageous conduct by the parties or the press. Appellants must therefore show specific publicity which has reached prospective jurors and which is so prejudicial that the jurors cannot set it aside. State v. Smith, 116 Ariz. 387, 390, 569 P.2d 817 (1977).

Every member of the jury panel knew of the appellants in some way. This is not surprising. The escape of two convicted murderers from the state prison is clearly newsworthy. And when the two and their accomplices are not immediately apprehended, but, rather, are implicated in new murders, extensive coverage of their capture and trial is to be expected. Moreover, the public had a right to a free and open discussion on the issues crystalized by the escape and subsequent incidents; issues which touched all phases of our criminal justice system, notably capital punishment and government officials who allegedly "coddle"criminals.

Publicity about appellants and other criminal defendants serves an important First Amendment interest. See Richmond Newspapers, Inc. v. Virginia, ____ U.S. ____, 100 S.Ct. 2814, 2824-25, ____ L.Ed.2d ____ (1980); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 587, 96 S.Ct. 2791, 2816, 49 L.Ed.2d 683 (1976) (Brennan concurring). It is in consideration of this First Amendment interest that the law requires a defendant to show the prejudice of the publicity, not simply its extensiveness. Hence, the issue is whether the jurors can actually set aside their knowledge and opinions to render a verdict based solely on the evidence produced in court. See State v. Greenawalt, supra.

While every member of the jury panel had heard about the appellants, the amount of knowledge varied markedly from juror to juror. Some knew details of the crimes, while one juror recalled absolutely nothing about the crimes. The majority of potential jurors remembered the incidents in August, 1978 in only a general and vague way. More important, even though about one-half of the panel admitted to having preconceived opinions on appellants' guilt, half of those swore the opinions were so weak they could be set aside. Veniremen who could not so swear or swore they "would try" to set the opinion aside were excused.

Appellants correctly point out that Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), holds that jurors' assurances of impartiality are not dispositive. Instead, the record of voir dire must be examined to determine if the total circumstances of the case and its publicity exhibit actual prejudice. The most important factors in this determination are the nature of the publicity and the difficulty in selecting a jury.

Appellants state they "were the subject of front page headlines, feature stories, photographs, and editorials on virtually a daily basis from July 30, 1978 through the date of trial" and that the publicity about them was "very intense and often emotion charged." The newspaper articles submitted by appellants do not support these assertions. Nearly all were dispassionate factual summaries of the alleged offenses and the progress of the manhunt. Appellants stopped being "the subject of front page headlines * * * on virtually a daily basis" near the end of August when Gary Tison's body was discovered. The newspapers published only one or two front-page stories each from that time until the December trial.

The only material that could be described as inflammatory appeared in the Yuma Daily Sun, a paper no member of the Pinal County

jury panel read, and in editorials and letters to the editor in the Arizona Republic, a Phoenix newspaper. The letters to the editor, on the whole, do not show a specific prejudice against appellants. Rather, they illustrate a disdain for all criminals and for government officials who, in the eyes of the letter writers, do not deal harshly enough with criminals. The bulk of these letters were published in August. The editorials singled out appeared on August 9 and 16, 1978. The editorials detailed the histories and past criminal records of appellants, especially appellant Greenawalt. The August 16 editorial concluded by noting that only one Tison (Donald) was dead and remarking: "That might build a horrible final score: Killers 8, Society 1."

While clearly inflammatory, the material in the Republic was shown to have little effect on the jury panel. Of the twenty-three asked, only three potential jurors knew Greenawalt was a convicted murderer. Of the two Republic readers questioned by appellants' counsel, one testified he did not remember any heated discussions about appellants or that people were "up in arms." The other reader recognized the name of the editorial's author, but the juror remarked, incorrectly, that he wrote nothing on appellants. The appellants failed to show, unlike Irvin v. Dowd, supra, that the community here was inflamed against appellants at the time of their trial.

This lack of prejudice is also illustrated by the ease of jury selection. Only forty-nine veniremen were needed to form the thirty-person panel on which the parties exercised their peremptory challenges. Of the nineteen excused for cause, only ten or eleven 2/

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2/ The uncertainty in the number excused for fixed opinions is attributable to one juror who, while stating he could set aside his opinion of guilt, could not set aside the fact that these particular appellants did not testify.

were excused for fixed opinions on guilt. Appellants argue more jurors would have been excused for cause had the trial judge employed the proper standard for disqualification and had he not "intimidated" the potential jurors during voir dire.

It is contended the judge approved jurors who stated they would only "try" to set aside their opinions. As an illustration, appellants point to the following exchange between the judge and a juror:

> "THE COURT: But if you can lay aside those opinions or those prejudices or feelings you might have and decide the case as I have told you upon what happens here in the courtroom, not what you might have read about the case, not what your neighbors might have discussed with you, but if you can lay that aside and decide that case based upon what you hear in the courtroom, then you are qualified to be a juror.
>
> Can you do that, sir?
>
> [THE JUROR]: I can try.
>
> THE COURT: I guess that is all we can really ask you to do, sir."

Appellants moved for a mistrial on the basis that jurors must set aside their opinions, not simply try to do so. The motion was denied and its denial is assigned as a separate count of error. While we agree jurors must do more than try, we find no error in either the denial of the motion or in the standard utilized for jury selection. The exchange between the court and the juror, while occurring in the presence of the entire panel, occurred very early on the first day of the three-day jury selection process. During that process, each venireman was individually questioned by court and counsel outside the presence of the other potential jurors. Any venireman stating he would only "try" to set aside an opinion was excused by the court. The trial judge did not err. See State v. Clayton, 109 Ariz. 587, 592-93, 514 P.2d 720 (1973).

Citing Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), appellants argue jurors with knowledge of appellants' other crimes should have been automatically excused. Appellants also urge us to require the disqualification of jurors holding opinions on guilt of the crimes charged regardless if the opinion can be set aside. The Supreme Court laid down the Marshall rule in the exercise of its supervisory power over the federal courts. The rule has no application to the state courts. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). We reject both per se rules urged by appellants, preferring the test announced in State v. Schmid, 109 Ariz. 349, 353, 509 P.2d 619 (1973), that knowledge or opinion about the crime charged, collateral crimes or the defendant personally is not enough to disqualify a juror absent an inability to set aside the knowledge or opinion.

Appellants also contend the trial judge "intimidated" the jurors into testifying that they could set aside their knowledge and opinions, when in fact they could not. We believe the record reflects otherwise. Instead of intimidation, we see the trial judge taking great pains to explain to the jurors that they could serve as jurors even though they were aware of facts or even held opinions of guilt as long as they swore to set them aside. Such a concept is difficult to grasp to those unfamiliar with legal thinking and, at times, posed difficulty to this particular panel, of which only a few had served previously as jurors. Even appellants' counsel had difficulty grasping this concept. Appellant Greenawalt's attorney argued that the more intelligent jurors "are intelligent enough to know that they cannot totally set these matters aside, and that they cannot honestly say they will not be influenced by them", while the less intelligent jurors "aren't so introspective and don't look at things, they aren't willing to analyze and consider carefully the issues." We reject this argument since it is premised on the

fact, which we do not find, that the publicity in this case was extremely prejudicial and pervasive. We further reject the argument since its result is that no one, not even a judge, could ever try this case. This simply is not the law. The law presumes some people, even intelligent ones, can be dispassionate.

In their last assignment of error regarding pretrial motions, appellants argue they were entitled to a continuance to combat the effect of publicity, particularly after Ricky Tison's overnight escape from the Pinal County Jail one week before the trial. As stated previously, this motion is directed to the trial court's discretion. In light of the utter lack of evidence of community prejudice and the statements of those jurors with knowledge of the escape that they would set aside that knowledge, we find no abuse of discretion. We do not find any indication appellants were denied a trial by fair and impartial jurors. Nor do we find any abuse of discretion in the trial judge's refusal to change venue or venire or in refusing to grant a continuance.

Moving to the substantive charges against appellants, they argue the trial court erred in not granting a directed verdict as to the counts of assault with a deadly weapon committed against the civilians during the prison escape. As to this, there was testimony that appellants were holding revolvers and shotguns, that they ordered the civilians to stand against a wall and no one would "get hurt" and that later the civilians were escorted to and locked in a storage closet. Testimony also showed that one of the armed appellants "covered" the door to the closet as each person was lead into it and that a shotgun was pointed into the crowded closet as the door was shut. Appellants argue this evidence fails to show assault with a deadly weapon since there was no testimony that appellants pointed their guns directly at each civilian.

Assault with a deadly weapon is the attempt, with criminal intent, to commit a physical injury on another, coupled with the use of a deadly weapon in that attempt and the then present ability to accomplish the injury. State v. Gordon, 120 Ariz. 172, 584 P.2d 1163 (1978). When traditional deadly weapons are used, as here, the law does not impose stringent definitions on intent and attempt. The only intent required is general intent, that is, the defendant need only intend the acts which he performs. State v. Bustamonte, 122 Ariz. 105, 593 P.2d 659 (1979). As for attempt, we recently held that that does not require the pointing of a gun in a threatening manner. State v. Van Dyke, ____ Ariz. ____, 621 P.2d 22 (1980). In a more general statement, we have said:

> "when a person holds a deadly weapon in a position so that it could immediately be used to physically injure another, he need go no further toward the completion of a battery in order to satisfy the 'attempt' element inhering in A.R.S. § 13-249." State v. Gordon, supra, at 175.

When the evidence is considered in the light most favorable to the State and all inferences drawn against appellants, State v. Pittman, 118 Ariz. 71, 574 P.2d 1290 (1978), it is apparent substantial evidence exists to support a finding that the guns were held in a manner so they could be used to immediately injure the civilians. There is no requirement that a weapon be directly and solely pointed and leveled at every person. It is sufficient that the civilians were "covered" since from that fact the jury could have inferred that the guns could be used to immediately injure the civilians. This is in accord with our holding that a jury could find attempt where a defendant "attempted to bring the pistol to bear on" the victim, but did not actually point the pistol at him. State v. Seymour, 101 Ariz. 498, 499, 421 P.2d 517 (1966).

Appellants object to the admission of numerous rifles and pistols into evidence. In their brief, appellants refer to Exhibits 1 through 12 and 22. Exhibit 22 was withdrawn and never admitted. No objection was made to the admission of Exhibits 5 and 10, hence their admission cannot be made the grounds for error. State v. Glasco, 124 Ariz. 454, 605 P.2d 33 (1980). The objection to the other weapons is that there was no evidence that they had been fired or even that they were pointed out of the van during the roadblock incident. For authority, appellants cite State v. Gallagher, 97 Ariz. 1, 396 P.2d 241 (1964), where we held inadmissible a knife and scabbards found in appellant's car since "[n]one of these items were properly connected to the crime in question and had nothing to do with appellant's guilt or innocence." Id. at 8. The meaning of "properly connected to the crime in question" is unclear. Appellants take it to mean that unless a weapon was shown to have been fired or to have been pointed out of the van, the weapon was irrelevant since its admission did not make the fact of assault with a deadly weapon any more probable than not. We believe appellants' argument and interpretation of Gallagher confuses relevancy with the sufficiency of the State's evidence to avoid a directed verdict. We have said:

> "evidence is relevant if it has any basis in reason to prove a material fact in issue. It is not necessary that such evidence be sufficient to support a finding of ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable. Udall, Arizona Law of Evidence, § 111 [p. 206] (1960)." Reader v. General Motors Corporation, 107 Ariz. 149, 155, 483 P.2d 1388 (1971) (emphasis added).

United States v. McCoy, 517 F.2d 41 (7th Cir 1975) provides a good illustration of this principle. There the appeals court held in a prosecution for passing a counterfeit bill that the trial court properly admitted other bills found in a store manager's office several days after the defendant had been detained there unattended since the bills "had a tendency to prove that the first bill had

not been passed innocently." Id. at 44. See also Weinstein, Evidence ¶ 401 [06], pp.401-21.

Officers involved in the roadblock incident testified multiple gunshots were directed at them from multiple sources within the van. There was testimony that these weapons were discovered in the abandoned van or near where appellants hid in the desert at the time of their arrest. Such facts make it more probable than not that some or all of the weapons were used to assault the officers at the roadblocks. Additionally, they make it more probable than not that appellants knowingly eluded a police car, another crime charged, with the large number of weapons further suggesting appellants freely aided and abetted the criminal activity and were not coerced into crime. A sufficient connection was established between the weapons and the crimes charged. We reject the idea that only those weapons actually shown to have been used in the assaults were admissible. Any implication in State v. Gallagher, supra, to the contrary is disapproved.

It is also contended the weapons should have been excluded since their prejudice outweighed their probative value. This argument is spurious. Numerous witnesses described these weapons and testified how and where the weapons were discovered. The weapons apparently were even exhibited to the jury during this testimony. All this was done without objection and long before the weapons themselves were admitted into evidence. We see no new special prejudice arising from the admission of the actual weapons. The analogy to unreasonably gruesome pictures is not convincing.

Appellants complain the trial judge incorrectly refused a requested instruction to the effect: "Guilt cannot be established by mere association or by presence of a person at scene [sic] even with knowledge that a crime is being committed." This instruction misstates the law and would have misled the jury since mere presence

can evidence aiding and abetting where there is preconcert. State v. Hernandez, 112 Ariz. 246, 247, 540 P.2d 1227 (1975). There was also no error committed when a simple assault instruction was refused since there was no evidence to support it. See United States v. Enos, 453 F.2d 342 (9th Cir. 1972)(federal prosecution of American Indian for violation of A.R.S. § 13-249); State v. Sanders, 110 Ariz. 503, 505, 520 P.2d 1127 (1974). We agree with the prosecutor's statement in the trial below, which is similar to the trial judge's comments in United States v. Enos, supra:

> "Your Honor, it would seem to me that there is either assault with a deadly weapon or there may not have been any type of assault at all."

or as the trial judge below replied:

> "Well, it appears to me there were either guns used there or not. If there were guns out there, it is assault with a deadly weapon."

Appellant Raymond Tison argues the trial court erred in refusing to appoint an investigator. He concedes A.R.S. § 13-1673 (now A.R.S. § 13-4013(B)), providing for the appointment of experts, only applies in capital cases. He further presents no evidence that prejudice, substantial or not, arose from the denial resulting in an unfair trial. There was no error. See State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (App. 1980).

Appellants assign two other alleged errors, but they concede the errors do not amount to reversible error and were waived at trial. Appellants correctly point out that the Second Amended Judgment as to Raymond Tison contains two clerical errors. Our independent review of the record reveals a clerical error in the Amended Judgment as to Ricky Tison. These typographical errors do not require reversal or remand. See State v. Pieck, 111 Ariz. 318, 320, 529 P.2d 217 (1974); A.R.S. § 12-2103(A), 4 A.R.S.

It is ordered that any reference to Counts XIV and XIX, Cause Number 7979 in Raymond Tison's formal judgment be deleted and that any reference to Count XIV, Cause Number 7979 in the sentence for

Count IX, Cause Number 8007 in Ricky Tison's formal judgment be changed to Count XIX, Cause Number 7979.[3/]

Convictions and sentences affirmed.

FRED C. STRUCKMEYER
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN
Vice Chief Justice

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

FRANK X. GORDON, JR.
Justice

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3/ Count XIV, Cause Number 7979, was dismissed as to all appellants prior to trial. Count XIX, Cause Number 7979, was the charge of bringing prohibited articles into prison. Only Ricky Tison, not Raymond Tison, was convicted on this count.

Exhibit E

IN THE SUPREME COURT OF THE STATE OF ARIZONA

| | |
|---|---|
| STATE OF ARIZONA,<br><br>Appellee,<br><br>vs.<br><br>RICKY WAYNE TISON,<br><br>Appellant. | No. 4612<br><br>ORDER AFFIRMING JUDGMENTS OF CONVICTION AND SENTENCES (MANDATE) |

Appeal from the Superior Court of Yuma County Number CR-9299
Honorable Douglas W. Keddie, Judge

Robert K. Corbin, The Attorney General
by William J. Schafer III, Bruce M. Ferg and
David R. Cole, Assistant Attorneys General

Attorneys for Appellee

Echeverria, Glenn & Howard
by Phillip W. Glenn and
Dwight P. Callahan
and
Alan M. Dershowitz

Attorneys for Appellant

Alan M. Dershowitz and
Alice L. Bendheim

Attorneys for Amici Curiae

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the Judgments of Conviction and Sentences of the trial court entered in the above-entitled cause be affirmed, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 9th day of July, 1981.

STATE OF ARIZONA
SUPREME COURT

I, S. ALAN COOK, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming

Judgments of Conviction and Sentences, made and entered in the above-entitled cause by said Court on the 9th day of July, 1981.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona this 11th day of September, 1981.

S. ALAN COOK, Clerk

cc:
Hon. Robert K. Corbin, Attorney General; David S. Ellsworth, Yuma County Attorney; Hon. Douglas W. Keddie, Trial Judge; Department of Corrections, Central Office; Phillip W. Glenn, Esq., and Dwight P. Callahan, Esq., of Echeverria, Glenn & Howard; Alan M. Dershowitz, Esq.; Alice L. Bendheim, Esq.; Ricky Wayne Tison.

Exhibit F

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

September 11, 1981

STATE OF ARIZONA,

Appellee,

vs.

RICKY WAYNE TISON,

Appellant.

Supreme Court
No. 4612

Yuma County
No. CR-9299

The following action was taken by the Supreme Court of the State of Arizona on September 10, 1981 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - DENIED."

Copy of Order Affirming Judgments of Conviction and Sentences enclosed herewith.

S. ALAN COOK, Clerk

By Rebecca Lamberg
Deputy Clerk

TO:
Phillip W. Glenn, Esq., and Dwight P. Callahan, Esq., Echeverria, Glenn & Howard, 711-E East Cottonwood Lane, Casa Grande, Arizona 85222
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007 ATTN: William J. Schafer III and David R. Cole
Bruce M. Ferg, Assistant Attorney General, 315 State Government Building, 402 West Congress Street, Tucson, Arizona 85701
David S. Ellsworth, Yuma County Attorney, Yuma County Courthouse, P.O. Box 1048, Yuma, Arizona 85364
Ricky Wayne Tison, Arizona State Prison, Box B-39199, Florence, Arizona 85232
Alice L. Bendheim, Esq., Bendheim & Mote, 17 East Thomas Road, Suite 1, Phoenix, Arizona 85012
Prof. Alan Dershowitz, Room 302-Griswold Hall, Harvard Law School, Cambridge, Massachusetts 02138

Exhibit G

IN THE SUPREME COURT OF THE STATE OF ARIZONA

| | |
|---|---|
| STATE OF ARIZONA,<br><br>Appellee,<br><br>vs.<br><br>RAYMOND CURTIS TISON,<br><br>Appellant. | No. 4624<br><br>ORDER AFFIRMING JUDGMENTS AND SENTENCES<br>(MANDATE) |

Appeal from the Superior Court of Yuma County Number CR-9299
Honorable Douglas W. Keddie, Judge

---

Robert K. Corbin, The Attorney General
by William J. Schafer III, Bruce M. Ferg and
David R. Cole, Assistant Attorneys General

Attorneys for Appellee

Boyd T. Johnson
and
Alan M. Dershowitz

Attorneys for Appellant

Alan M. Dershowitz
and
Alice L. Bendheim

Attorneys for Amici Curiae

---

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the Judgments and Sentences of the trial court entered in the above-entitled cause be affirmed, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 9th day of July, 1981.

---

STATE OF ARIZONA
SUPREME COURT

I, S. ALAN COOK, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming

Supreme Court No. 4624
ORDER AFFIRMING JUDGMENTS
AND SENTENCES
Page Two

Judgments and Sentences, made and entered in the above-entitled cause by said Court on the 9th day of July, 1981.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona this 11th day of September, 1981.

S. ALAN COOK, Clerk

cc:
Hon. Robert K. Corbin, Attorney General; David S. Ellsworth, Yuma County Attorney; Hon. Douglas W. Keddie, Trial Judge; Department of Corrections, Central Office; Boyd T. Johnson, Esq.; Alan M. Dershowitz, Esq.; Alice L. Bendheim, Esq.; Raymond Curtis Tison.

**Exhibit H**

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

September 11, 1981

| | |
|---|---|
| STATE OF ARIZONA,<br><br>Appellee,<br><br>vs.<br><br>RAYMOND CURTIS TISON,<br><br>Appellant. | Supreme Court<br>No. 4624<br><br>Yuma County<br>No. CR-9299 |

The following action was taken by the Supreme Court of the State of Arizona on September 10, 1981 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Affirming Judgments and Sentences enclosed herewith.

S. ALAN COOK, Clerk

By Rebecca Gonzalez
Deputy Clerk

TO:
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007 ATTN: William J. Schafer III and David R. Cole
Bruce M. Ferg, Assistant Attorney General, 315 State Government Building, 402 West Congress Street, Tucson, Arizona 85701
David S. Ellsworth, Yuma County Attorney, Yuma County Courthouse, P.O. Box 1048, Yuma, Arizona 85364
Raymond Curtis Tison, Arizona State Prison, Box B-39198, Florence, AZ 85232
Boyd T. Johnson, Esq., Platt, Jenson & Johnson, 161 West Central Avenue, P. O. Box 278, Coolidge, Arizona 85228
Alice L. Bendheim, Esq., Bendheim & Mote, 17 East Thomas Road, Suite 1, Phoenix, Arizona 85012
Prof. Alan Dershowitz, Room 302 - Griswold Hall, Harvard Law School, Cambridge, Massachusetts 02138

Exhibit I

FILED
NEWMAN
SUPERIOR COURT

1979 MAR 29 AM 9 31

COUNTY ARIZONA
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

| | |
|---|---|
| STATE OF ARIZONA,<br><br>Plaintiff,<br><br>vs.<br><br>RICKY WAYNE TISON and<br>RAYMOND CURTIS TISON,<br><br>Defendants. | NO. 9299<br><br>JUDGMENT AND SENTENCE |

This matter came on for pronouncement of judgment and sentence on the 29th day of March, 1979, the State being represented by Michael Irwin, Yuma County Attorney, and the defendants, Ricky Wayne Tison and Raymond Curtis Tison, being personally present before the court and represented by Michael Beers and Harry Bagnall, their attorneys of record respectively. The court informed the defendants that they were charged by the indictment herein with the commission of the crimes of: four counts of murder in the first degree, two counts of armed robbery, four counts of kidnapping, and one count of theft of a motor vehicle, to which charges you entered pleas of not guilty. Thereafter the kidnapping of Christopher Lyons charge was dismissed. On the 27th day of February, 1979, as to Ricky Wayne Tison, and on the 6th day of March, 1979, as to Raymond Curtis Tison, after a trial by jury, verdicts of guilty were returned

against each of you for the commission on or about August 1, 1978 of the crimes of: murder in the first degree of John F. Lyons, murder in the first degree of Donnelda Lyons, murder in the first degree of Christopher Lyons, murder in the first degree of Theresa Jo Marie Tyson, kidnapping of John F. Lyons, kidnapping of Donnelda Lyons, kidnapping of Theresa Jo Marie Tyson, armed robbery of John F. Lyons, armed robbery of Donnelda Lyons, and theft of a motor vehicle with the intent to permanently deprive the owner of its possession.

No legal cause having been shown why judgment and sentence should not now be pronounced against the defendants, opportunity having been given them so to show, the court, having considered all matters connected with the case, proceeded with the pronouncement of judgment and sentence.

It is the judgment of this court that each of you be punished for these crimes in the following manner:

1. For the crime of theft of a motor vehicle with intent to deprive the owner of its possession permanently, by commitment to the Department of Corrections of the State of Arizona for a term of not less than four nor more than five years to commence from this date.

2. For the crime of robbery of John F. Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than fifty (50) years nor more than life to commence on this date.

3. For the crime of robbery of Donnelda Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than fifty (50) years nor more than life to commence on this date.

4. For the crime of kidnapping of John F. Lyons

by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, commencing on this date.

5. For the crime of kidnapping of Donnelda Lyons by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which sentence shall commence on this date.

6. For the crime of kidnapping of Theresa Jo Marie Tyson by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which sentence shall commence on this date.

7. In determining what punishment should be imposed for your convictions of murder of John F. Lyons, Donnelda Lyons, Christopher Lyons and Theresa Jo Marie Tyson, this court has weighed the aggravating circumstances and the mitigating circumstances set forth in its special verdict. This court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Therefore, each of you is sentenced to death on each of the murders of which you have been found guilty, and you shall be committed to the Department of Corrections of the State of Arizona to carry out that sentence in accordance with the provisions of A.R.S. §13-1654 and 13-1655. Reference is to those sections of the Arizona Revised Statutes as they were numbered prior to October 1, 1978 and at the time of the commission of the crimes of murder.

DATED this 29th day of March, 1979.

DOUGLAS W. KEDDIE

JUDGE OF THE SUPERIOR COURT

**Exhibit J**

instant case which did not result in a death penalty at the trial level and thus have not been reported in the appellate decisions.

There may also be a constitutional prohibition against a death sentence under these circumstances as well as the statutory prohibition outlined in A.R.S §13-454(F)(3). See Lockett v. Ohio, U.S. 57 L.Ed.2d 973, 98 S.Ct. (1978). In Lockett, the plurality of the Supreme Court held that the Ohio death penalty statute was constitutionally infirm because it provided for a limitation of the mitigating factors which could be considered by the sentencing authority. Three members of the Supreme Court indicated that there may be a constitutional problem with a statute that will allow the imposition of the death penalty when there has been no showing of an intent on the part of the defendant to kill the victim.

It must be noted that contrary to the implication in the prosecutor's memorandum, the Supreme Court did not specifically uphold the imposition of the death penalty in a felony-murder situation, it merely failed to reach that issue because it was unnecessary to do so in order to reverse Lockett's conviction. In fact, there is clear indication in that opinion that the members of that plurality are ready to entertain a challenge to the imposition of the death penalty on a felony-murder conviction. This is clearly indicated in the sentence that immediately follows the quotation from the plurality opinion found on page 3, lines 18 through 20, of the prosecutor's memorandum and is reprinted here:

> "'that states have authority to make aiders and abettors equally responsible as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.'"
>
> "But the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty." 57 L.Ed.2d at 988 (emphasis added).

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The prosecution has quoted extensively from Justice Rehnquist's dissenting opinion but a careful reading of the case clearly indicates that seven of the eight justices who participated in that decision reject Justice Rehnquist's position. Of the three justices who reached the issue of whether a death penalty was appropriate in a felony-murder case, Justice White and Justice Marshall rejected the death penalty for felony-murder under any circumstances and Justice Blackman made a qualified rejection of the death penalty for a felony-murder conviction.

In his concurring opinion, Justice Marshall explained the constitutional problem with imposing the death penalty in a felony-murder situation as follows:

> "She was convicted under a theory of vicarious liability. The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition, Weems v. United States, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); it makes no distinction between a wilful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. See State v. Lockett, 49 Ohio St. 2d 48, 67 (1976) (dissenting opinion).
>
> Permitting imposition of the death penalty solely on proof of felony-murder, moreover, necessarily leads to the kind of 'lightning bolt,' 'freakish,' and 'wanton' executions that persuaded other Members of the Court to join Mr. Justice Brennan and myself in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the 'evolving standards of decency . . . .'" 57 L.Ed.2d at 999 (citations omitted).

Regardless of whether this Court determines that there is a constitutional prohibition against sentencing a defendant to death when his conviction was based solely on vicarious liability

it is contended that the facts of this case clearly indicate that the Defendant's participation was sufficiently limited to qualify as a substantial mitigating circumstance under A.R.S. §13-454(F)(3). It should be further noted that the Lockett Opinion recites the interesting fact that of the 364 executions for homicides since 1954 for which facts are available, only eight clearly involved defendants who did not actually commit the murder and of that eight at least two hired a third person to commit the murder and thus had the requisite intent to kill. Of those eight executions, the most recent was in 1955. Thus, it would seem clear that regardless of whether there is a constitutional prohibition upon the imposition of the death penalty for vicarious liability in a homicide, the evolving standards of common sense and decency clearly indicate that such a sentence is far outside the norm.

It must be regretably noted that the prosecutor is attempting to argue to the Court that Ricky's statements concerning the facts of this case are untrue. Such an inference on the part of the prosecutor is clearly out of line for several reasons: first, Ricky's statements are absolutely, positively consistent with all the physical evidence; second, the prosecutor himself believes those statements to be true; and acting upon that belief entered into a plea bargain whereby Ricky would receive a life sentence; and third, Ricky's statement given to Tom Brawley immediately after the entry of the plea is entirely consistent with his prior statements and with the physical evidence. The prosecutor has inferred that the statement is somehow self-serving, but neglects to point out to the Court that the statement was made after the plea was entered, and the sentence substantially determined. At that time the Defendant had absolutely no reason to tell anything but the complete truth and it is contended to this Court that the prosecutor has made this

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argument in bad faith and that he has no grounds to believe that it has any merit in law or in fact.

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STANFIELD McCARVILLE, COXON, COLE & FITZGIBBONS

B. Can the Acts of Randy Greenawalt and Gary Tison Be Imputed to Ricky Tison for Purposes of Inflicting The Death Penalty?

The aggravating circumstance in issue here is "(E)(6) the defendant committed the offense in an especially heinous, cruel or depraved manner." The first rule of statutory construction is that the court must attempt to give effect to the intent of the legislature and that it must follow the plain language of the statute unless to do so would lead to an absurdity. United States Fidelity and Guaranty Company v. Michigan Bank, 27 Ariz. App. 478, 556 P.2d 326 (1976).

This aggravating circumstance, just like the other five, refers to the actions and intentions of the defendant. The Defendant before this Court is Ricky Tison and the facts of the case are abundently clear. The question is: Did Ricky Rison commit this murder in an especially heinous, cruel or depraved manner? The answer, of course, is no. Ricky was convicted of murder because of his participation in the underlying felonies of robbery, kidnapping, and/or escape. Gary Tison and Randy Greenawalt may or may not have committed the offense in a cruel and depraved manner and that is for the Court to decide. However, it cannot be rationally argued that Ricky's actions were in any way cruel and depraved.

Had the murders been drawn out over an extended period without any effort on Ricky's part to prevent them, or if there was any indication that Ricky had reason to believe that Theresa Tyson had survived the assault, then perhaps his actions would have been cruel or depraved. However, all the evidence indicates that the shootings took place with no prior notice to Ricky, that they were over in a matter of seconds, and that no rational person would dream that anyone could have survived for even a few seconds after the shooting stopped.

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There might conceivably be a case in which a person who was not the actual trigger man could have the depraved manner of the killing imputed to him, as for example the depravity of the Manson killings should be imputed to Manson because he ordered the killings; however, when there is no indication that the Defendant before the Court had any prior knowledge at all of these killings, it borders on the irrational to impute responsibility to him for the precise manner in which they were carried out.

The prosecutor has submitted no authority for his proposition except for the attempt on page two of his memorandum to convince this Court that A.R.S §13-137 and §13-139 should apply to §13-454. There are numerous technical flaws in his reasoning, for example, it is a basic rule of statutory construction that when there is a specific statute and a general statute concerning the same matter, that the specific rather than the general statute will control. Another technical flaw in the prosecution's reasoning is that the death penalty statute has been carefully constructed to fit within constitutional parameters and that the legislature has evidenced absolutely no intent to take other portions of the criminal code and graft them on to the death penalty statute for purposes of expanding its scope.

The real flaw, however, in the prosecution's argument is that it flies in the face of a common sense reading of the aggravating circumstance being discussed here. For all of the above reasons, it is submitted that this Court should not find this aggravating circumstance.

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Did the Defendant Knowingly Create a Grave Risk Of Death to Another Person or Persons in Addition To the Victim of the Offense?

The two leading Arizona cases on this aggravating circumstance are State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977) and State v. Blazack, 114 Ariz. 195, 560 P.2d 54 (1977). In Doss the defendant shot the victim in a place crowded with college students and in Blazack the defendant opened fire on patrons of a crowded bar. Neither case is precisely on point with the case at bar but both cases indicate an intent on the part of the Arizona Supreme Court to apply this aggravating circumstance to situations in which the defendant carries out his murder in such a manner as to endanger innocent bystanders.

Easily imagined examples of this would be the killer who places a bomb on an airplane for purposes of killing one of the passengers with the net result being the death of all the passengers or the person who poisons the water supply of an entire apartment complex for the purpose of killing one of the tenants. Such crimes are rightfully viewed by society as particularly immoral in that the perpetrator not only exhibits an extreme lack of moral sensitivity but also because many people who are in no way involved with the murderer are killed, often for the purpose of disguising the murderer's identity and the identity of his intended victim.

The prosecution has raised the interesting question of whether this aggravating circumstance is designed to also apply to multiple murders. Once again, it is submitted to this Court that the plain language of the statute, and its treatment by the Arizona courts indicates that this is not the purpose of the statute; however, it is certainly clear that multiple murders are more reprehensible than solitary murders, so there is no question but that there is a strong public policy basis in making multiple

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murders an aggravating circumstance. However, the legislature could easily have listed multiple murders as an aggravating circumstance but has apparently chosen not to do so.

The mere fact that sound public policy would be served by making multiple murders an aggravating circumstance does not grant this Court the right to graft such an aggravating circumstance into a plainly written statute, nor can it be argued that the failure to list multiple murders in the aggravation portion of the statute is a legislative oversight because there are many particularly morally reprehensible types of murders which have not been provided for in the aggravating circumstances. Some examples would be a murder committed while molesting a child under the age of 13 or a murder committed while committing mayhem on another person because the acts of the defendant would be so disgusting to organized society that the death penalty should probably ensue. There are other types of crimes where the motives of the defendant are so outrageous that civilized men might feel compelled to demand the death penalty. An example of a particularly depraved motive would be the murder of one person for the purpose of preventing him from rescuing the originally intended murder victim.

Therefore, there are many types of murder that seem particularly evil which have not been specified as aggravating circumstances.

The two cases cited by the prosecution, State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977), and State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), appear to support the reasoning expressed above as opposed to the theory advanced by the prosecution, especially the quote on lines 20 through 23 of page 6 of the prosecution's memorandum. However, the State has also cited State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977), and a reading of Ceja indicates language which would tend to support the

LAW OFFICES
STANFIELD, McCARVILLE, COXON, COLE & FITZGIBBONS

prosecution's position. However, a careful reading of Ceja indicates that the court never reached the issue of whether a multiple murder per se creates a grave risk of harm to each victim and the court's reasoning appears to render irrelevant the fact that Randy Leon was subsequently killed, at least so far as it relates to this particular aggravating circumstance.

The evidence in this case clearly indicates that all four victims were intended victims and it is submitted to this Court that the aggravating circumstance in question applies only to the endangering of non-intended victims. Therefore, the prosecution's speculations concerning "indiscriminate shooting" are not really relevant to the presence or absence of this aggravating circumstance.

Finally, as with all the other aggravating circumstances involved in this case, the prosecution is requesting the Court to impute the actions of Gary Tison and Randy Greenawalt to Ricky Tison. No authority has been produced to support this position and it is contended that each aggravating circumstance, whether read individually or read as a whole with the entire statute, relates to the actions of the particular defendant before the Court. Therefore, it is contended that even if the Court should find that this particular aggravating circumstance is present, it should not be applied to this Defendant, but only to Defendant Greenawalt.

LAW OFFICES
STANFIELD, McCARVILLE, COXON, COLE & FITZGIBBONS

**Exhibit K**

Laws 1973, Ch. 138, §5, Ariz. Rev. Stat. Ann. §13-454 (Supp. 1957-1978) (Repealed 1978).

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F.

The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are not mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person. Added Laws 1973, Ch. 138, §5.

## CERTIFICATE OF SERVICE

I, Alan M. Dershowitz, Attorney of Record for the Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court, I have this day served a true and correct copy of this petition for a writ of certiorari, two motions to proceed in forma pauperis, two affidavits of petitioners, an affidavit of counsel, and a motion to expedite consideration and consolidate for hearing upon Respondent by sending a copy of said documents by first class mail addressed to:

Mr. Robert K. Corbin
Attorney General of
the State of Arizona
403 West Congress Street
Tucson, Arizona 85701

This 27 day of October, 1981.

Alan M. Dershowitz

OCT 27 1981
ALEXANDER L. STEVAS,
CLERK

81-5634
NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,
Petitioners

v.

STATE OF ARIZONA,
Respondent

MOTION TO EXPEDITE CONSIDERATION OF JOINT PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARIZONA AND CONSOLIDATE FOR HEARING WITH ENMUND V. FLORIDA, NO. 81-5321

Petitioners respectfully move this Honorable Court to expedite consideration of their joint petition for certiorari and to consolidate their cases for argument with Enmund v. Florida, No. 81-5321, which this Court agreed to review on October 19, 1981. Petitioner's counsel has been authorized by the Attorney General of Arizona to represent to this Honorable Court that the State of Arizona, respondent in this case, joins in this motion and also requests that the Petition in this case be expedited and that this case be consolidated for argument with Enmund v. Florida. Petitioners' counsel has also been authorized to represent to this Court that the Attorney General of Arizona waives the right to file any additional submissions on the motion or petition, so that these matters may be submitted to the Court at its next conference. Petitioners and respondent represent that they are willing to comply with the briefing schedule established by this Court for the Enmund case, pursuant to which petitioners' brief will be due on December 3, 1981 and respondent's brief will be due on January 2, 1982.

As the ground for their motion, petitioners and respondents agree that the constitutional issue presented for review in Enmund v. Florida is present in this case. In Enmund, the Court granted certiorari on the following issue: "...whether a death sentence is a proportionate penalty where the killing for which the defendant stands convicted was unintentional or committed by a co-perpetrator in the course of a felony murder." Petition for Writ of Certiorari at 10, Enmund v. Florida, No. 81-5321.

Although the facts in the instant case are somewhat different from those in Enmund, the constitutional issue is the same. The petitioners in this case -- who were 18 and 19 years old when the crimes occurred -- were convicted of murder on a theory of aiding and abetting in a felony murder. They were sentenced to death and their sentences were affirmed by the Arizona Supreme Court, which concluded:

> "That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance. Ricky and Raymond Tison associated themselves with others who were willing to and had in the past committed homicidal acts."
>
> (Appendix attached to the Joint Petition for a Writ of Certiorari, pp. 32a-33a)

The issue presented by the instant case, therefore, is whether two teenage boys who did not intend to kill, plot to kill or actually pull the triggers can be executed for associating with their father and his friend who murdered four people in cold blood and "who were willing to and have in the past committed homicidal acts." (33a)

Petitioners in this case will contend that the execution of Ricky and Raymond Tison would violate the Eighth and Fourteenth Amendments. Respondents will contend that it would

not. Both sides agree, however, that the issue in this case is the same as that presented in Enmund v. Florida and that the cases should be consolidated for oral argument.

As additional grounds for the motion, petitioners represent that their present attorney, Alan Dershowitz, Esq., has done extensive research on the Anglo-American history of the felony murder rule and its relationship to capital punishment, and petitioners wish to present this research to the Court in the context of their case.

Finally, petitioners contend that although the broad constitutional issues presented by Enmund v. Florida and the instant case are the same, there are some factual differences between the cases which would provide this Court an opportunity to make distinctions among the cases, if warranted.

FOR THE FOREGOING REASONS, petitioners respectfully request that the Honorable Court grant their motion to expedite consideration of this petition and consolidate their cases for hearing with Enmund v. Florida.

By their attorneys,

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